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Regulating the employment relationship in Europe: A guide to Recommendation No. 198

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International
Labour
Office
Geneva

Regulating the employment relationship in Europe: A guide to Recommendation No. 198

The background features large, faint, stylized numbers '198' and 'No.' in a dark red color. Below the title, there are white line-art silhouettes of four people (two men and two women) walking towards the right. To the right of the silhouettes, there are three overlapping white squares.

**Employment Relationship
Recommendation, 2006 (No. 198)**

Governance
and Tripartism
Department

European
Labour Law
Network
(ELLN)

**REGULATING THE EMPLOYMENT RELATIONSHIP
IN EUROPE:**

A guide to Recommendation No. 198

**Governance and Tripartism Department
International Labour Office • Geneva**

European Labour Law Network (ELLN)

March 2013

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R 198 Preamble:

Protection of workers is at the heart of the ILO's mandate, the principles set out in the Declaration on Fundamental Principles and Rights at Work, 1998 and the Decent Work Agenda.

Laws and regulations, and their interpretation, should be compatible with the objectives of decent work because they seek, among other things, to address what can be an unequal bargaining position between parties to an employment relationship.

Protection of workers' rights in labour laws, regulations and collective agreements are generally linked to the existence of an employment relationship between an employer and an employee. The issue of who is or is not in an employment relationship has become problematic in recent decades as a result of major changes in work organization, as well as in the adequacy of legal regulation in adapting to these changes.

During its 95th session (2006), the International Labour Conference adopted the Employment Relationship Recommendation, 2006 (No. 198) which covers the following points:

- the formulation and application of a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship;
- the determination – via a listing of pertinent criteria – of the existence of such a relationship, relying on the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement that may have been agreed between the parties; and
- the establishment of an appropriate mechanism – or the use of an existing one – for monitoring developments in the labour market and the organization of work so as to be able to formulate advice on the adoption and implementation of measures concerning the employment relationship.

This Recommendation recognizes that there is a role for international guidance to member States in achieving protection that is equally accessible to men and women, through national law and practice.

With a view to ensuring a follow up of the implementation of the Recommendation, the International Labour Office was instructed to assist constituents in developing national policies and setting up monitoring and implementing mechanisms, as well as to promote good practices at the national and international levels concerning the determination and use of employment relationships.

In response to that decision, the International Labour Office, developed in 2007 an Annotated Guide to Recommendation No. 198 using the technical expertise of a group of experts from around the world which presented examples in law and practice on how the various aspects of the Recommendation were being dealt with in many countries in different regions.

Over the recent years, there have been increasing developments at the European level regarding the employment relationship in legislation, case law, collective agreements and soft law. In this context, the ILO, and in particular the then Industrial and Employment Relations Department (DIALOGUE) undertook a strategic partnership with the European Labour Law Network (ELLN), a network of independent legal experts from all

European Union Member States and European Economic Area countries, in order to produce an updated version of the 2007 annotated Guide with a specific focus on European countries.

The European Labour Law Network was established in 2005 on initiative of Professors Guus Heerma van Voss (University of Leiden) and Bernd Waas (University of Frankfurt am Main), the latter being the editor of this Guide. The European Labour Law Network is comprised of non-governmental legal experts from all European Member States and the EEA countries. In December 2007, the European Labour Law Network signed a contract with the Directorate-General for Employment, Social Affairs and Inclusion of the European Commission in Brussels (formerly the Directorate-General for Employment, Social Affairs and Equal Opportunities) and, under the name 'European Network of Legal Experts in the Field of Labour Law, dealing with both individual and collective rights/aspects', became the European Commission's official advisory board on issues relating to developments in individual and collective labour law. In this capacity, the Network has been conducting extensive research for the European Commission. Among other things, it produced a Thematic Report on the "Characteristics of the Employment Relationship" in 2009. This guide builds upon up-dated information analysed in that research project. (More information at: <http://www.labourlawnetwork.eu>)

The ILO Governance and Tripartism Department welcomes the result of this fruitful collaboration with the ELLN and would like to sincerely thank Professor Bernd Waas (University of Frankfurt am Main), editor of the Guide and Professor Guus Heerma van Voss (University of Leiden) as well as all the ELLN experts who contributed to the Guide and Corinne Vargha (ILO Senior Labour Law and Labour Relations Specialist) who initiated and coordinated this publication.

We hope that the European experience on the practice and legal framework for the employment relationship will prove useful to tripartite constituents when dealing with the implementation of the provisions of the ILO Recommendation No 198 concerning the Employment Relationship.

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I. National policy on the protection of workers in an employment relationship

R 198 Paragraph 1:

Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.

1. Applying a national policy

There is widespread agreement that an increasing number of workers are not protected by labour law and that a genuine need for policy exists in this area. The following examples of national policies adopted by governments and social partners in Europe provide information on policy rationale and lessons learned from their implementation; these examples show how national policies are elaborated by legislation, collective bargaining agreements (CBAs), codes of practice, studies, judicial decisions, etc. They also show how governments can respond to changing circumstances by legislating a policy approach and how labour law can be innovative in protecting workers.¹

Legislative examples

Belgium – Act on Home Working of 6 December 1996. Home working has long co-existed with enterprise-based employment. Until recently, it mainly concerned manual workers. However, with the development of new technologies, home working has opened up to new activities, such as text processing, translation, data encoding and invoicing, forms of employment and has attracted considerable interest. Given the increasing number of home workers, and a perception that the protection of home workers through case law was diminishing and variable, it was deemed urgent to adopt a new policy that would recognize them and provide them the same level of protection as that of other workers. The government therefore decided to introduce legislation on the factors determining the existence of an employment relationship for home workers. The 1996 Act on Home Working extended the scope of application of the Act on Employment Contracts of 3 July 1978 to include home workers. Two factors distinguish the employment contract of home workers from a standard employment contract: (i) work is being performed from home or any other place chosen by the worker, and (ii) there is no direct control or supervision of the worker. Further to the 1996 Act, teleworkers (i.e. persons performing work from home or any other place using information and communication technologies) are subject to specific regulation under the National Collective Labour Agreement No. 85 on Telework, which was signed on 9 November 2005 and entered into force with the Royal Decree of 13 June 2006. The collective agreement complements the 1996 Act on Home Working by defining the status of teleworkers and establishing their working conditions.

Belgium – According to the Program Act of 27 December 2006, the King can issue a list of specific factors relevant to determining the existence of an employment relationship in a particular sector or in one or more

¹ Readers should refer to the Glossary (Annex III) to better understand the differences in the use of the terms “worker” and “employee”.

occupations. These factors are intended to supplement the general criteria of legal subordination and control, i.e. working under the authority of another person, which the Act sets out to distinguish between the definition of “employee” and “self-employed person”. The factors relate more to economic dependence than to legal subordination and may include, among other things, consideration of whether the worker employs staff, owns premises and/or supplies working material, invests capital, participates to a significant extent in profits or losses or has authority to make investment decisions. The social partners in the Joint Committee, established for a specific branch of industry, and the National Labour Council have an advisory power regarding the determination of specific criteria by the King (Article 336).

Bulgaria – Amendments of the Labour Code of 2011 explicitly provide for home work, telework and temporary agency work as constituting work performed under an employment relationship (Articles 107b–107y of the Labour Code).

Czech Republic – Until 2007, the statutory definition of an “employee” referred to an individual who performed certain “tasks”. Following an amendment of the Labour Code in 2007, the definition of “employee” is no longer based on the types of “tasks” performed, notwithstanding whether these are common or uncommon, but rather on the “nature of the work” (dependent or non-dependent).

Hungary – The former Labour Code [Act XXII of 1992] did not provide a legal definition of the term “employee”. The new Labour Code, which came into force on 1st July 2012 sets out under Section 34 that: “Employee means any natural person who works under an employment contract”. Section 42(2) 2 states that: “Under an employment contract a) the employee is required to work as instructed by the employer; b) the employer is required to provide work for the employee and to pay wages.”

Poland – Regulations on telework (Article 67⁵ – Article 67¹⁷ of the Labour Code) were enacted in 2007. Within the meaning of the Labour Code, a teleworker refers to an employee who performs work away from the employer’s premises on a regular basis using means of electronic communications. Teleworkers are to be afforded equal treatment to that of employees who perform work at the employer’s premises. Further, telework must always be performed by mutual agreement. Although an employer may instruct an employee to perform different types of work for three months each year, an employer may not unilaterally direct an employee to perform telework, even for this three-month period.

Portugal – Employment relationships are governed by the Labour Code, approved by Law No. 7/2009 of 12 February. Telework refers to an activity performed with legal subordination, usually outside the enterprise and by means of information and communication technologies (Article 165 of the Labour Code). A telework contract shall be entered into in writing (Article 166 No. 4 of the Labour Code). The teleworker has the same rights and duties as other employees, particularly as regards professional training and career promotion, maximum working hours and other working conditions, and health and safety at work (Article 169 No. 1 of the Labour Code). Specific rules regarding the employee’s privacy and rights to collective representation

are also foreseen (Articles 170 and 171 of the Labour Code). In principle, telework requires the agreement of both the employee and the employer.

Collective bargaining agreements

European Union – The voluntary European Framework Agreement on Telework of 16 July 2002 aims to establish a general framework at the European level to be implemented by the members of the signatory parties (European Trade Union Confederation, UNICE/UEAPNE and CEEP) in accordance with the national procedures and practices specific to management and labour. Clause 3 of the Framework Agreements states:

The passage to telework as such, because it only modifies the way in which work is performed, does not affect the teleworker's employment status. A worker refusal to opt for telework is not, as such, a reason for terminating the employment relationship or changing the terms and conditions of employment of that worker.

Italy – Many collective agreements provide for the establishment of permanent observatories, which are responsible for verifying the effectiveness and efficiency of the negotiated provisions.

Judicial decisions

As statutory definitions are incomplete—if they exist at all—the task of defining the “employment relationship” has essentially been left to the courts. As a result, national courts have developed various criteria, indicators or tests to determine whether a contractual agreement qualifies as an employment relationship or an employment contract.

Iceland – No legislative definition of the term “employment relationship” exists in Iceland. Who is considered an employee and, hence, as being in an employment relationship with an employer has therefore evolved through case law. Numerous cases involving disputes over employment status and the existence of an employment relationship have gone before the Supreme Court. The parties’ characterisation and intention are not determinative of the status of their relationship. Rather, this is determined by the nature of their relationship in fact. An employment relationship is considered to be based on an employment contract, traditionally defined as being an agreement between the employer and the employee, where the employee undertakes to work for the employer under the employer’s supervision and the employer undertakes to pay wages in return. It can be based on either a formal contract or a more informal arrangement, such as when an individual starts working for an employer who sets and pays the individual a salary. In principle, a verbal contract is considered just as valid as a written one under judicial precedent. A valid employment contract can be established without an underlying formal arrangement between the parties. The courts take various factors into account to determine whether the nature of the relationship is in fact an employment relationship. These include factors such as the duration and continuity of the task, operations, wage-related expenses, facilities, provision of tools and materials, responsibility and risk, the relationship between the negotiating parties, union affiliation, type of remuneration, sick days,

whether the work is carried out in person, independence, vacation pay, tax payments, work supervision, and work hours.

Codes of practice and administrative directives

Ireland – Due to heightened concern about the number of individuals classified as “self-employed” who, when assessed against the relevant “indicators”, would be more appropriately classified as “employees”, an Employment Status Group was set up under the Programme for Prosperity and Fairness. The Group, appointed by the Irish Government, consisted of representatives of various ministries and of employers’ and workers’ organisations. Having decided against recommending legislative clarification of who should and should not be considered an employee, the Group instead recommended issuing a Code of Practice for determining employment or self-employment status. The Code of Practice, which was last updated in 2010, is monitored by the Group itself. The Code introduces criteria that facilitate the classification of an individual’s employment status—employee versus self-employed worker – “to eliminate misconceptions and provide clarity”. An individual’s employment status is to be determined by considering the criteria listed in the Code (as applicable to the particular individual) in the context of examining the individual’s work as a whole, including the conditions of work and the reality of the relationship. Although not legally binding, the Code enjoys legitimacy due to approval by consensus of the employers’ and workers’ representative bodies, as well as by the competent authorities.²

The Programme for Prosperity and Fairness’s “Code of practice for determining employment or self-employment status of individuals” (June 2010) lists the following criteria:

Employees	Self-employed
An individual would normally be an <u>employee</u> if he or she:	An individual would normally be <u>self-employed</u> if he or she:
<ul style="list-style-type: none"> ▪ is under the control of another person who directs as to how, when and where the work is to be carried out; ▪ supplies labour only; ▪ receives a fixed hourly/weekly/monthly wage; ▪ cannot subcontract the work. If the work can be subcontracted and paid by the person subcontracting the work, the employer/employee relationship may simply be transferred on; ▪ does not supply materials for the job; ▪ does not provide equipment 	<ul style="list-style-type: none"> ▪ owns his or her own business; ▪ is exposed to financial risk, by having to bear the cost of making good faulty or substandard work carried out under the contract; ▪ assumes responsibility for investment and management in the enterprise; ▪ has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks; ▪ has control over what is done, when and where it is done and whether he or she does it personally;

² See also International Labour Conference, 95th Session, 2006, Report V(1) – “The Employment Relationship”, p. 33 f.

other than small tools of the trade. The provision of tools or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate having regard to all the circumstances of the case;

- is not exposed to personal financial risk in carrying out the work;
 - does not assume responsibility for investment and management in the business;
 - does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements;
 - works set hours or a given number of hours per week or month;
 - works for one person or for one business;
 - receives expenses payments to cover subsistence and/or travel;
 - is entitled to extra pay or time off for overtime.
- is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken;
 - can provide the same services to more than one person or business at the same time;
 - provides the materials for the job;
 - provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account;
 - has a fixed place of business where materials, equipment, etc. can be stored;
 - costs and agrees a price for the job;
 - provides his or her own insurance cover;
 - controls the hours of work in fulfilling the job obligations.
-

Hungary – In Hungary, a joint administrative directive was issued in 2005 by the Ministry of Labour and the Ministry of Finance. In this legal instrument, general (primary and secondary) criteria are established for the purposes of determining the existence of an employment relationship. The primary criteria are: obligation (of the employee) to perform the work in person; obligation (of the employer) to offer employment; integration in the business, organisation and work arranged by the employer; and subordination as such. The secondary criteria are: the right to direct; determination of duration of work and the schedule of working time; determination of place of employment/work; payment in kind (protection of wages); performance of work within the employer's infrastructure (means of production); ensuring the conditions for occupational safety and health; and contract in writing. This administrative directive was repealed because of the new Labour Code [Act I of 2012 on the Labour Code] in 2012, but its main principles remain applicable.

In 2000, the European Commission raised the issue of economically dependent work during consultations with the social partners on the modernisation and improvement of employment relationships. The social partners and the Commission agreed that additional information and research was necessary. The European Parliament also called on the Commission to conduct an in-depth study on economically dependent workers. Consequently, the Commission launched the study “Economically dependent work/Parasubordination: legal, social and economic aspects” headed by Alberto Perulli (<http://ec.europa.eu>).

In 2009, the European Labour Law Network put forward a comprehensive report entitled “Characteristics of the Employment Relationship” (<http://www.labourlawnetwork.eu>).

Finally, studies have also been carried out on the issue of employment status (see, in particular, Burchell, Deakin, and Honey, “The Employment Status of Individuals in Non-standard Employment”, Department of Trade and Industry Report, 1998, URN 98/943). Academic work is also being conducted in the UK, specifically by Freedland, to redefine the employment relationship and base it on a ‘personal employment contract’ to avoid the need of having to rely on artificial classifications of employee/worker, etc. (Freedland, *The Personal Employment Contract* Oxford, 2005 and Freedland and Kountouris, *The Legal Construction of Personal Work Relations*, Oxford, 2011). In France, a study by Sciberras and Antonmattei, which was presented to the relevant Minister in 2008, assessed the conditions for self-employment in France and proposed means to improve the situation of those who are genuinely self-employed. The report also evaluated the implication of the “grey zone” between direct employment and self-employment, and proposed the introduction of a new classification between the two, namely the “economically dependent worker”.

In **Spain**, many studies have been carried out to determine the elements of an employment relationship and its differentiation from other legal relationships. Some of these studies were commissioned by the government with the purpose of preparing corresponding legislation (for instance, the law on self-employment in 2007).

A combined approach

In the **United Kingdom**, a mixed approach comprising statutes, regulations and case law is used to meet the challenge of new types of work. In some cases judges have demonstrated a degree of judicial creativity to imply a contract of employment between, for example, a user undertaking and a temporary worker. For instance, in *Dacas v. Brook St Bureau* [2004] ICR 1437, the court found that “as a general (but not invariable) rule for employment law purposes a temp supplied by an employment agency to an end-user client will be an employee of the client and will be neither self-employed nor an employee of the agency itself”. Furthermore, it stated that “in determining the employment status of someone working under a ‘contract for services’ (as opposed to a contract of employment) for an employment bureau on a long-term basis, an Employment Tribunal should

consider the possibility of an implied employment contract between worker and client”. Subsequent case law has, however, emphasised that this approach is the exception, not the norm, and that usually the individual will not be the employee of the user (*James v. Greenwich LBC* [2008] IRLR 302).

In addition, statutory powers were introduced to enable ministers to extend employment rights to certain individuals vis-à-vis an employer (however defined), to provide that such individuals are to be treated as parties to an employment contract, and to make provisions as to who is to be regarded as their employer:

Employment Relations Act 1999, amended 2004, Section 23:

... (2) The Secretary of State may by order make provision which has the effect of conferring any such right on individuals who are of a specified description. (...) (4) An order under this section may- (a) provide that individuals are to be treated as parties to workers' contracts or contracts of employment; (b) make provision as to who are to be regarded as the employers of individuals; (c) make provision which has the effect of modifying the operation of any right as conferred on individuals by the order; (d) include such consequential, incidental or supplementary provisions as the Secretary of State thinks fit.

However, these powers have not yet been used.

2. Reference to other international labour standards

Some policies draw on already existing international labour standards. As noted in Recommendation No. 198, “all relevant international labour standards, especially those addressing the particular situation of women, as well as those addressing the scope of the employment relationship” should serve as inspiration for policy choices. The pertinent international labour standards included in Annex IV provide useful guidance for formulating a national policy to cover workers in situations requiring protection, because their employment status is unclear or is deliberately being disguised.

R 198 Paragraph 3:
National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.

R 198 Paragraph 18:
As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among

3. Social dialogue (consultation and collective bargaining)

ILO Recommendation No. 198 emphasises social dialogue as the ideal means to achieve consensus on resolving questions relating to the scope of the employment relationship at the national level. Using concrete examples, this section illustrates the usefulness of tripartite social dialogue and collective bargaining in the design and implementation of national policies. It also aims to promote best practices.

Note: The prerequisite for successful social dialogue is the existence of strong, independent and autonomous workers’ and employers’ organisations. Recommendation No. 198 states that the most representative organisations of employers and workers should be represented on an equal footing in any national mechanism and consulted for the monitoring of developments in the labour market and the organisation of work. This involves the establishment and strengthening of mechanisms for dialogue and networks among constituents, as well as the

others, of finding solutions to questions related to the scope of the employment relationship at the national level.

*Other related
Paragraphs of R198:
7(a), 11(c), 20*

forging of alliances and partnerships to better address the complex phenomena around the employment relationship.

The role of social dialogue and collective agreements in defining an employment relationship

Only in a minority of countries do collective agreements play a role in defining an “employment relationship”/“employment contract” (**the Netherlands, Sweden and Denmark**). In the **Netherlands**, social dialogue mechanisms and collective bargaining may play a role in defining employment relationships by setting out the definitions of an employment relationship in collective agreements. In **Sweden**, modifications and specifications of the general definition of an “employee”, derived from established customs in a given branch or from regulations in collective agreements, are respected by the labour courts and often used to determine a person’s status. Social dialogue mechanisms and collective bargaining play a particularly important role in **Denmark**. It is left to the parties to a collective agreement to define the parties to an employment contract with reference to the working conditions. Hence, it is possible for a person to be considered an “employee” within the scope of a given collective agreement, but not according to employment legislation.

In the majority of countries, neither social dialogue mechanisms nor collective bargaining is relevant for determining whether an “employment relationship” or “employment contract” exists (**Austria, Belgium** with the exception of the advisory power of the social partners in the Joint Sectoral Committee and the National Labour Council related to specific criteria in a particular sector or in one or more occupations, **Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland** (with the exception of the entertainment industry and journalists), **Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain** and the **UK**). It is noteworthy, however, that although collective agreements in the **UK** do not affect the scope of the employment relationship, trade unions in the UK have been active in securing employment rights for temporary agency workers, whose employment status is uncertain. In some countries, the parties to a collective agreement are actually prevented by law from disposing of the requirements of an “employment relationship” or “employment contract” (**Austria, Bulgaria, France, Greece, Liechtenstein, Norway, Poland, Portugal** and **Spain**).

Denmark – In principle, it is left to the parties to a collective agreement to define the parties to an employment contract with reference to the working conditions set forth in the collective agreement. As a consequence, it is possible for an individual to be considered an employee within the scope of a collective agreement, even though he or she is not regarded to be an employee under applicable employment laws. For example, many media companies have concluded collective agreements with trade unions covering freelance workers, such as journalists and photographers engaged by daily papers and broadcast companies. Some of these freelancers might not be considered employees under all employment-related legislation.

Netherlands – Social dialogue mechanisms and collective bargaining can play a role in defining employment relationships by establishing corresponding definitions of an employment relationship in collective

agreements. Such collective agreements apply their own definitions determining which workers fall within their scope. For example, the collective agreement “Grafimedia”, which applies to publishers, states that it is not only applicable to employees, but also to homeworkers who are required to fulfil their work duties personally, even if they do not work under the authority of the company.

In **Spain**, the role of collective agreements in this area is extremely limited. However, some collective agreements require companies to hire workers directly, instead of outsourcing their activities by subcontracting work to other firms or to self-employed persons.

Sweden – The ‘Swedish Model’ of industrial relations is characterised by a high degree of autonomy of the social partners, a high rate of trade union organisation (approximately 73 per cent at the time of writing), and a reliance on collective bargaining as the main instrument for the regulation of employment conditions and relationships. There is no statutory definition of the term ‘employee’. Instead, the courts have developed a multi-factor test for the purposes of determining whether or not an individual is an employee. This test seeks to assess the overall situation of the individual in question against that of an ordinary employee or an ordinary self-employed worker. In applying this test, the Labour Court will be strongly guided by the customary employment practices of a specific branch of business or the provisions of collective agreements specifying who is to be considered an employee (for example, the collective agreements on freelance work and freelancers, concluded by the Swedish Union of Journalists and corresponding employers’ organisations/employers).

The role of trade unions in representing specific group categories of workers

In most European countries, trade unions are not authorised to, or simply do not, represent specific categories of workers (who are not employees). However, in most European countries specific categories of workers, such as freelancers, certain categories of self-employed persons and economically dependent workers are only represented to a minimum extent, if at all. This implies that these categories of workers are, by and large, not subject to collective bargaining agreements.

Austria – Collective agreements may only be concluded for employees (Article 1(1) of the Labour Constitution Act). The same applies to work agreements (between the employer and the works council) and to worker representation at plant level in general: only employees are represented by works councils and only employees can elect or can in principle be elected as employee representatives. However, economically dependent self-employed persons whose situation closely resembles that of employees (so-called “employee-like” persons) are covered by certain labour laws and may be members of the Workers Chamber, a state body which lobbies for the interests of employees and collaborates closely with trade unions.

Employee-like persons are not covered by collective agreements. However, some sub-groups, such as home-workers and journalists, are covered by so-called “comprehensive” agreements. The conclusion and content of these agreements are regulated by statutory codes and closely modelled on that

of collective agreements. As a result, employee-like persons may enjoy, for instance, minimum wages, etc.

Denmark – Trade unions are, in principle, only authorised to take industrial action or conclude collective agreements on behalf of employees. This restriction arises from a general prohibition on collective agreements between self-employed persons. However, according to unwritten labour law principles, a trade union is entitled to take industrial action in support of a collective agreement for all types of work carried out on the basis of employment. It is left to the labour court to decide whether the work is being carried out on the basis of employment or self-employment, and the concept of employment developed by the courts is quite inclusive. For example, the Labour Court has granted the right for trade unions to take industrial action in support of a collective agreement which covers freelance work in the media sector. The decision of 24 August 2007 (A2007.293) was in line with a decision issued by the Competition Board ruling that this specific type of work was not to be considered as being carried out on the basis of self-employment. As many atypical workers and self-employed persons are members of trade unions, many collective agreements have been concluded by trade unions on behalf of atypical workers, i.e. persons not employed on a regular open-ended employment relationship such as part-time workers, fixed-term workers, temporary workers, agency workers and freelancers.

Liechtenstein – A collective agreement may have effects on freelancers and specific categories of self-employed persons if the contracting parties are accordingly authorised under their by-laws. However, for the power of trade unions and employers' associations to introduce regulations with normative effect is legally limited to employment contracts (Section 1173a Article 105(1) of the Civil Code) no direct claim exists between the freelancer/self-employed person and his or her contractor.

Lithuania – Article 1 of the Act on Trade Unions allows persons working under an employment contract, as well as persons who are not covered by the Labour Code such as civil servants, freelancers and other self-employed persons, to organise and join trade unions. In addition, Lithuanian law allows trade unions to organise members along the lines of a specific profession or on any other ground. However, while the right of a union to represent members, to conclude collective bargaining agreements or to initiate strikes is explicitly granted to employees' trade unions by virtue of the Labour Code, and to civil servants by virtue of special provisions in the Law on Civil Service, if the members of a trade union are not covered by employment legislation, there is no possibility of initiating collective bargaining on the members' behalf.

Netherlands – Rights for freelancers and specific categories of self-employed persons may be established by collective agreements. However, trade unions normally represent employees. Although some trade unions represent specific categories of self-employed workers, such as the *Alternatief voor Vakbond* (which represents, among others, freelancers and flex-workers, i.e. persons working on the basis of fixed-term employment agreements) and the Trade Union for Independent Workers (*FNV zelfstandigen*), problems of representation arise from a shortage of members and substantial differences between the interests of special categories of workers.

Romania – Article 40(1) of the Constitution states that “citizens may associate freely in political parties, in trade unions, in employers’ organisations and in other forms of association”. That is, the freedom of association in trade unions is not limited to a given category of employees or public officers. However, neither the previous Law on Trade Unions, nor the current law (Law no. 62/2011 on Social Dialogue), provides the possibility for self-employed persons to establish a trade union.

Spain – Collective agreements apply to salaried workers only. However, on the basis of the Law on Self-employment, which has been effective since 2007, organisations that represent such persons (specific associations or trade unions) can conclude specific agreements for this group (so-called “professional interest agreements”).

Sweden – Self-employed persons are increasingly joining trade unions. Some professional unions have a high share of members who are self-employed, while other white collar unions have recently witnessed a rapid increase in the number of self-employed members. The ‘Swedish Model’ of industrial relations enables trade unions to organise new categories of workers. The Co-determination Act (1976:580) provides for a general right of negotiation for all trade unions which have at least one member in a given workplace, and additional rights of negotiation and co-determination are granted to trade unions bound by a collective agreement with the employer.

Poland – The Law on Trade Unions specifies which categories of working persons can become members of trade unions. Employees, members of agricultural co-operatives and individuals who are parties to an agency contract are entitled to establish trade unions. A collective agreement must be concluded for all employees employed by employers who are bound by its provisions (Article 239(1) of the Labour Code). A collective agreement may be applicable to individuals who carry out work within an arrangement other than an employment contract (Article 239(2) of the Labour Code). Thus, the rights and duties of persons under civil law contracts or who work together with an employer can be the subject of a collective agreement. However, collective agreements cannot be exclusively concluded for the benefit of persons who perform work under civil law contracts. Collective agreements regulate the legal position of employees and may only cover other categories of working persons in addition.

Ireland – The principal obstacle trade unions face in securing collective bargaining rights for specific categories of workers, such as self-employed persons, is the Competition Act 2002. As part of the last social partnership agreement, the Government undertook to enact legislation that would exclude voice-over actors, freelance journalists and session musicians from the provisions of the Act when engaging in collective bargaining. However, no such legislation had been enacted at the time of writing.

Luxembourg – The legal framework of collective bargaining is restricted in its scope of application to employees and no provision is made for the inclusion of freelance or self-employed workers.

Other elements of social dialogue

In many countries in Europe the social partners play an important role either by influencing legislation, participating in decision-making by the

courts, or both. This is illustrated by the following non-exhaustive list of examples.

Austria – Social dialogue plays an indirect role in determining employment status in individual cases. The panels of the courts for labour law and social security law are partly composed of members of the social partners (lay judges), always one from the employers' and one from the workers' side. The panels of the Court of first Instance (Landesgericht, in Vienna Arbeits – und Sozialgericht) are composed of one professional judge as chairman and two lay judges. The panels of the Court of Second Instance (Oberlandesgericht) are composed of three professional judges and two lay judges. The small panels of the Supreme Court consist of three professional judges and two lay judges; the big panel (which assumes competence for very important cases) is composed of seven professional judges and four lay judges. The lay judges have to be elected within the respective statutory social partner organisations. The term of office is five years. The lay judges are as independent in their office as the professional judges. Though the lay judges in principle enjoy the same rights and obligations as the professional judges, they only play a minor role in practice when it comes to deciding a case. The social security institutions are managed by the social partners and thus indirectly have competence to ascertain employee status in accordance with social security legislation. Social partners or works councils can submit a claim to determine the employee status of a given number of workers (see Art. 54 of the Employment and Social Courts Act).

Belgium – Consultation between the government and social partners, represented in the National Labour Council, has become an institutionalized practice, in particular at the beginning of a legislative procedure. Also, the panels of the courts for labour law and social security law are partly composed of members of the social partners.

Bulgaria – The social partners play an essential role by participating in law preparation. Pursuant to Article 3 of the Labour Code, "the State shall design the regulation of employment and the directly related relations, the social insurance relations, as well as issues on living standards, in collaboration and following consultations with the employees' and the employers' representative organisations". For this purpose a National Council as well as industry, branch, regional and municipal councils for tripartite cooperation were established representatives of the state, the most representative employers' organisations and the most representative trade unions being represented in equal numbers.

Denmark – The social partners do not have a formal "right" to be consulted before Parliament passes legislation related to the labour market. There is, however, a longstanding practice of consultation of the social partners before legislation and secondary legislation in this field is passed. Furthermore, the social partners play a very important role in the administration of much of the legislation, e.g. as members of administrative boards and tribunals.

France – In France, social dialogue plays an important role in law preparation. Pursuant to Article L. 1 of the Labour Code, prior consultation with the national social partners is required before the government may initiate any reform dealing with individual and collective work relations, employment or vocational training. To this end, the government forwards a policy document to the social partners outlining the elements of diagnosis,

objectives and key options. If the social partners agree to engage in negotiations, they indicate to the government the period they deem necessary to conduct such negotiations.

Ireland – There was a period (mid-1990s to mid-2000s) when the Social Partnership process had a major influence on the content of employment legislation. For instance, the Maternity Protection (Amendment) Act 2004 gave effect to the recommendations made by the working group on the review and improvement of maternity protection legislation, which was set up in accordance with commitments in the Programme for Prosperity and Fairness. Similarly, the Parental Leave (Amendment) Act 2006 gave effect to the recommendations agreed by the social partners. Indeed, any opposition to amendments which went beyond the consensus reached by the social partners were firmly resisted. However, since the demise of social partnership in 2009, it is unlikely that trade unions and employers will have the same possibilities to influence the legislature.

Italy – Consultation between the government and social partners has become a consolidated practice. Many laws are products of such dialogue and explicitly assert that specific issues are to be regulated by the social partners through collective agreements. However, this trend seems to have been declining in recent times due to the economic and financial crisis which has forced upon the legislature drastic changes in the regulation of labour relations, not always supported by social partners, in particular trade unions.

In **Latvia** any modification of labour law requires consent by the social partners (tripartite meetings). In **Finland** and **Norway**, all important committees and work groups are tripartite as well. Consequently, the social partners have ample opportunities to influence relevant legislation, at least in principle.

Luxemburg – Consultation between the government and social partners has become a consolidated practice. Indeed, in the 1970s, during the steel crisis, a special tripartite committee was established to deal with the problems the labour market of Luxemburg faced at the time. Since then, it has become a standard practice for the government and social partners to meet on a regular basis, as the so-called “Tripartite”, and to discuss reforms on labour and social law. If an agreement is found, it is often implemented into law. The recent financial crisis, however, has brought the system to its limits, as no agreements could be found and the government had to organise separate bipartite meetings with the trade unions and the employers’ organisations.

Malta – The Malta Council for Economic and Social Development was promulgated by means of Act 15 of 2001, which set up the MCESD as a national structure for social dialogue. The significance of Act 15 of 2001 is primarily the recognition by the state of an entity whose mission is to promote social dialogue and bring about consensus between the social partners and members of civil society on a number of national economic and social issues. The MCESD had been operating as a national vehicle for social dialogue and consultation amongst government, employers and trade unions for a number of years, with the first formal attempt during an incomes policy accord over the period 1990-1993.

Netherlands – The social partners are consulted before law proposals on social issues are submitted to Parliament. Moreover, the social partners have considerable influence on the content of new law proposals. The largest and most recent amendment to dismissal law (by the Act on Flexibility and Security of 1999) was the result of an agreement between the social partners.

Poland – According to Article 19 of the Law on Trade Unions, unions which are representative at the national level have the right to issue an opinion on drafts of legal acts concerning their scope of activities (i.e. labour law and social security).

Romania – According to Romanian law, the Economic and Social Council which includes representatives of employers' organisations, trade unions and civil society has to be consulted on any legislative initiative in the field of labour law. However, this consultation is occasionally rather formal. For instance, the recent Law on Social Dialogue No. 62/2011 was adopted despite the social partners' opposition.

Slovakia – The social partners play an important role by participating in law preparation. Consultation between the government and the social partners is regulated by Act No. 103/2007. Under this Act, the Economic and Social Council was established at the national level as a consulting and concerting body of the government and the social partners. However, negotiations in the Council have often proved difficult. For instance, in 2011, the social partners could not reach an agreement on the new level of minimum wage.

Spain – Social dialogue ("social partnership") is a traditional and well established practice in Spain. Although there is no legal requirement for the preparation of labour laws, the government tends to open a dialogue between trade unions and employers' organisations, which regularly influence the content of subsequently approved laws. In addition, a government advisory body on socio-economic issues and employment exists, the so-called "Economic and Social Council", which represents different social sectors (including trade unions and business associations). Self-employed persons can join trade unions of employees. The major trade union confederations are generally keen to represent all workers (including self-employed persons) when negotiating with the government.

United Kingdom – The social partners can respond to a government consultation, but outside the implementation of the two European Directives on information and consultation and agency work, their influence is much less significant than in other European countries. However, although collective agreements have very little impact on defining an employment relationship, the trade unions have been active in securing employment rights for persons whose employment status is uncertain, e.g., in relation to temporary agency work.

4. Specific policy measures

The Office Report on employment relationships published in 2005 presents trends and justification for paying particular attention to certain aspects of policy, such as: global acceptance of the primacy of fact over form, the increasing reliance on determination through laws, the easing of the burden of proof for workers, a precise definition of the scope of the

employment relationship, delineating the boundary between dependent and independent work, the categorisation of specific types of work, and extending the scope of legislation to employee-like workers. Using good national examples, the following section illustrates what a national policy might include in this respect.

R 198 Paragraph 4:

National policy should at least include measures to:

*(a) provide **guidance** for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers; (...)*

R 198 Paragraph 2:

*(...) Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be **clear** and adequate to ensure effective protection for workers in an employment relationship.*

Clear guidance to the parties

As the following examples show, clarity in some countries is provided by case law; in others, it is provided by definitions – broad or very specific – in laws and codes. Still others use an administrative approach or provide assistance to individuals through a handbook or guidebook.

Germany – With regard to social security law, Section 7a of the Social Code IV contains an administrative procedure according to which the parties to a relationship can submit an application to an administrative body to determine the existence of ‘employment’. In addition, under certain circumstances, the competent collection office can initiate such proceedings. The general purpose of Section 7a is to provide a quick and straightforward tool to determine the existence of ‘employment’. Its main advantage lies in the fact that it generally reduces the risks that arise from an erroneous classification of the underlying relationship.

Belgium – The Belgian Federal Ministry of Labour published an electronic booklet on the key elements of an employment contract (<http://www.emploi.belgique.be>, v° “contrats de travail”). The primary aim of the publication is to fight disguised employment relationships by essentially restating the case law of the courts.

Italy – Section 75 of Legislative Decree No. 276 of 2003, the *Riforma Biagi*, introduced the “certification of contracts” with the aim of reducing labour disputes. The certification procedure determines whether a contract meets the proper subject and formal requirements set forth by law. The procedure can be carried out by the Labour Office, by so-called equal representation institutions (jointly managed by employers’ and employees’ representatives), and by special commissions set up by universities and their labour law chairs/research units. The “certification of contracts” is a voluntary procedure initiated on the basis of a joint written request by the parties to a contract. The “act of certification” must explicitly indicate the civil, administrative, social security or fiscal impact of the certification. Section 81(1) ensures clarity of the employment relationship status: “The organs of certification provide consultation and assistance to the contracting parties both in terms of the conclusion of an employment contract, its content and its modifications, in particular regarding the rights and precise categorisation of employment contracts”. In practice, certification has only had a very limited impact. However, as it was reformed in 2010, certification is considered to have become more relevant. In fact, it seems likely that employers will make extensive use of certification in the future.

Netherlands – The Tax Authority can certify a civil contract. The relationship of an individual (the provider of a service) and his or her client cannot be considered as being in an employment relationship if the provider possesses a declaration of independent contractor status (see Article 6(1)(e) of the Social Insurance Act). This declaration is valid for one

year and can be renewed annually. After three years, the declaration will be renewed automatically unless the situation has changed.

Ireland – The Code of Practice on Employment Status suggests that when there is uncertainty about whether an individual is employed or self-employed, the Local Tax Office or SCOPE Section of the Department of Social and Family Affairs should be contacted. After establishing all the relevant facts, a written decision on the status is issued. Such a decision, although not decisive save for social welfare purposes, is indicative of the worker's status.

Romania – After a contract is registered with the Register of Employees (REVISAL), it is considered an employment contract for fiscal purposes with regard to social security contributions, and for determining the competence of labour courts in cases of dispute. Similarly, the authorisation or registration with the Romanian Trade Registry creates the presumption that a civil contract has been concluded. In practice, legal disputes on the nature of the relationship between the parties only arose when no written contract was signed and no authorisation or registration was provided. However, in May 2011 the Labour Code was modified. Since then, an employment contract can only be concluded in writing, with an oral contract being null and void.

In **Spain**, the labour inspectorate can initiate court proceedings to determine whether or not a worker should be classified as an employee. The worker may also request information from the labour inspectorate, and, in case of dispute, initiate court proceedings. Employers may also request information from the labour inspectorate.

United Kingdom – Manpower, a large temporary work agency, has an "Employees Handbook". This is a voluntary measure to ensure clarity about the employment relationship the agency has with its employees. The Handbook states several times that persons working for Manpower are its employees, even when they are assigned to client enterprises.

European Union – On the European level, Article 4 of Council Directive 91/533/EEC of 14 October 1991 establishes the employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. The purpose of the Directive is to provide employees with improved protection, to avoid uncertainty and insecurity about the terms of the employment relationship, and to create greater transparency. To achieve this, the Directive states that every employee must be provided with a document containing information on the essential elements of his or her contract or employment relationship. Member States may, however, provide that the Directive shall not apply to employees who have a contract or employment relationship: (a) with a total duration of less than one month, and/or with a working week which does not exceed eight hours; or (b) of a casual and/or specific nature, provided that its non-application in these cases is justified by objective considerations (Article 1(2) of the Directive).

R198 Paragraph 4:
National policy should at least include measures to:
*(c) ensure standards applicable to all forms of contractual arrangements, including those involving **multiple parties**, so that employed workers have the protection they are due;*

Multiple parties

Noting that labour law has always dealt with situations in which contractual arrangements can have the effect of depriving workers of the protection they are due, and noting that Recommendation No. 198 does not affect

Convention No. 181 on private employment agencies, this section provides examples of approaches to contractual arrangements involving more than two parties.

The **European Union** enacted the Temporary and Agency Workers Directive 2008/104/EC in November 2008 to be transposed by Member States by 5 December 2011. The Directive seeks to attain the protection of temporary agency workers by ensuring that the principle of equal treatment is applied to them.

Article 3 – Definitions:

(1) For the purposes of this Directive:

(a) ‘worker’ means any person who, in the Member State concerned, is protected as a worker under national employment law;

(b) ‘temporary-work agency’ means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;

(c) ‘temporary agency worker’ means a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction;

(d) ‘user undertaking’ means any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily; (...).

The Directive, like all other Community Directives, is without prejudice to national law with regard to the definitions of pay, contract of employment, employment relationship and worker. However, Member States may not exclude workers, contracts of employment or employment relationships solely because these relate to part-time workers, fixed-term contract workers or persons with a contract of employment or an employment relationship with a temporary work agency within the scope of this Directive (Article 3(2) of the Directive). According to Article 5(1) Sentence 1 of the Directive, the “basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job”.

Germany – Section 9 No. 1 of the Act on Temporary Agency Work:

Contracts between temporary-work agencies and user undertakings and between temporary-work agencies and temporary agency workers are ineffective, if the temporary-work agency does not have the permission required under Section 1.

Section 10(1) sentence 1 of the Act on Temporary Agency Work:

If the contract between a temporary-work agency and temporary agency worker is ineffective according to Section 9 no. 1 of the Act, then an employment relationship between the user undertaking and the temporary agency workers (...) is deemed to exist (...).

Section 28e(2) sentence 1 Social Code IV:

With regard to fulfilling the pay obligation of the employer, the temporary-work agency is liable as a principal guarantor in case of an effective contract

between the temporary work agency and temporary agency workers (...) as far as workers have been hired-out by the temporary-work agency for pay.

Instead of using temporary agency workers, companies are often tempted to outsource activities by concluding service contracts with other companies, which then use their own employees. According to legal doctrine, there is temporary agency work if, and only if, the power to direct resides with the user-undertaking instead of the company supplying a given service. In practice, however, it has proved to be very difficult to discern temporary agency work from service contracts, because it is often particularly challenging to determine whether such power exists to the extent that it must be regarded as necessary.

Luxemburg – Article 133-2 of the Labour Code states:

(1) A contract under which an employee is hired to be lent to a user undertaking in violation of Article L. 133-1 [cases in which the conclusion of such a contract is admissible] is void. (2) In the case mentioned in paragraph (1), the user undertaking and employee are deemed to have entered into an open-ended contract since the beginning of the job performance.

However, the employee can terminate the contract with immediate effect and without owing damages as long as he/she is being hired-out to a user undertaking

Ireland – Agency workers are “deemed” employees for the purpose of employment and social welfare legislation. In some cases (unfair dismissal), they are deemed employees of the client; in others (organisation of working time) they are deemed employees of the agency.

Portugal – If the temporary work agency lacks a legal permit, Article 173, No. 1 and 3 of the Portuguese Labour Code stipulates that the activity will be considered to have been permanently rendered to the temporary work agency based on a permanent labour contract. Nevertheless, an order of temporary closure (Articles 192, No. 3 of the Labour Code) is issued to the temporary work agency and the offence is considered a very serious misdemeanour (Article 173, No. 7).

Slovenia's Employment Relationships Act, 1 January 2003 as amended in 2007, provides clear guidance by requiring the parties to define their mutual rights.

Article 61 (Agreement between the User and the Employer, Referral of the Worker). (1) Before the worker starts working, the user must inform the employer about all conditions which have to be fulfilled by the worker for the provision of work, and shall submit to the employer the assessment of risk of injuries and health damages. (2) Before the worker starts working with the user, the employer and the user shall conclude an agreement in writing in which they shall in greater detail define mutual rights and obligations as well as the rights and obligations of the worker and of the user. (3) In accordance with the agreement between the employer and the user, when referred to work with the user, the worker must be informed in writing about the conditions of work with the user, as well as about the rights and obligations which are directly related to the provision of work.

Article 62 (Rights, Obligations and Responsibilities of the User and of the Worker). (1) The worker must carry out the work pursuant to the user's instructions. (2) In the period during which the worker works with the user, the user and the worker must take into account the provisions of this Act, of collective agreements obligating the user, and/or of the user's general acts with

regard to those rights and obligations which are directly related to the performance of work. (3) If the user violates the obligations pursuant to the previous paragraph, the worker shall be entitled to refuse to carry out the work. (4) If the worker violates the obligations pursuant to subsection 1 of this Article, these violations shall be a possible justification for disciplinary proceedings or for the termination of the employment contract with the employer. (5) The worker shall take annual leave in accordance with the agreement between the employer and the user.

Netherlands – As of January 2010, a user undertaking, which has hired-out a temporary agency worker from a non-registered temporary work agency, is responsible for the payment of the minimum wage; in addition, the temporary work agency is responsible for paying full remuneration. As a consequence, the temporary agency worker has two debtors.

In **Spain**, it is lawful to subcontract work, in which case both companies are jointly and severally liable for wages and social security contributions. It is not permissible to transfer workers from one company to another. However, the transfer through legally-constituted temporary work agencies is lawful. If the temporary work agency does not meet the legal requirements, it may fall under a general prohibition to transfer workers. In that case, an employment relationship may be established between the temporary agency worker and the user undertaking.

Bulgaria – The new Articles 107p–107w of the Labour Code, introduced in 2011, included temporary agency work within the scope of the regulation. Temporary agency workers must now be considered as parties to an employment relationship. Article 107p (1) of the Labour Code states that “an employment contract with an enterprise providing temporary work shall stipulate that the employee concerned is to be commissioned for temporary work at a user undertaking, such work being supervised and controlled by the user undertaking”.

R 198 Paragraph 4:
National policy should at least include measures to:(...)
(g) provide for appropriate and **adequate training** in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

Provide for appropriate and adequate training

Training – both initial and continuous – is undoubtedly an effective means to share information on evolving aspects of the employment relationship and to clarify current national practice in this area. Various countries provide training and capacity-building for labour inspectors, arbitrators, judges and other labour administration officers.

Other persons responsible for dealing with the settlement of disputes and the enforcement of employment laws and standards, such as Ombudsmen and Human Rights Commissioners, often benefit from training courses on employment rights. Following the recommendation of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993, many countries have created a national human rights mechanism which individuals may use to file complaints of violations of human rights, including labour rights.

Training is particularly relevant for labour administrations, given that a weak labour administration leads to considerable delays in many countries to adopt and apply labour laws for the protection of workers.

R 198 Paragraph 5:

*Members should take particular account in national policy to ensure **effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship**, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.*

See also paragraphs 6, 7, 11(c), 21, 22.

5. Special categories of workers to protect

With regard to migrant workers, it should be noted that the ILO's Migration Report of 2004 states:

Subcontracting of temporary and seasonal workers through labour brokers in many sectors has been at the expense of worker benefits and entitlements such as holidays, bargaining rights and social protection. The manner of recruitment and placement thus has far-reaching consequences for the working conditions and general treatment of **migrant workers**. Some may be forced to endure situations of virtual debt-bondage or near-slavery to pay off debts owed to recruiters and traffickers.³

Research into the reach of labour administration into the **informal economy** indicates that sub-standard working conditions can be a problem:

Despite the lack of a common definition, laws referring to the informal sector are numerous, although they tend to be descriptive rather than prescriptive in content or laws creating administrative organs or public entities to deal with some aspect of informality. Taking into account that informal productive units can coincide with what are often termed micro-enterprises, the difference sometimes established is based on whether these are subsistence activities or profit-making ventures. As regards conditions of work, it is clear that there is no regulation applicable to self-employed workers in matters such as wages, and as for those employed by others, real earnings can be below the legal minimum. Neither are aspects such as the working hours and rest periods regulated for independent workers in labour legislation, although they may be subject to laws on opening and closing times for commercial or industrial establishments, which do not come under the labour authorities but stem from other ministries or local authorities. For employees, working time and rest are regulated, but it is likely that their duration is not respected, either through ignorance or lack of control.⁴

Vulnerable groups (women, young/old, persons with disabilities, informal economy, and migrants)

In areas of work where women predominate, such as domestic work, the lack of legal protection increases the vulnerability of workers who are already not appreciated as being "real workers" in many social and cultural contexts. As they work in private households, their work is invisible. While many new labour laws no longer exclude domestic work from basic labour protection, the specificity of their employment relationship is not addressed in most legislation. Their working conditions remain, in essence, unregulated, a problem which is frequently compounded for foreign domestic workers who may not be covered by the current labour laws of the countries in which they work, or are unable to claim those rights if they are working without proper documentation. The examples below demonstrate the measures countries have taken to protect such vulnerable groups.⁵

³ International Labour Conference, 92nd Session, 2004: Report VI "Towards a fair deal for migrant workers in the global economy" (ILO, Geneva, 2004), para 137.

⁴ Daza, J.-L.: "Informal economy, undeclared work and labour administration", DIALOGUE Working Paper No. 9, ILO, Geneva, June 2005.

⁵ Blackett, A.: *Making domestic work visible: the case for special regulation*, Geneva, ILO, 1998. For additional comparative information on regulation of domestic work, see *Effective Protection of Domestic Workers: a guide to designing labour laws*, ILO, May 2012.

European Union – Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-Term Work states in Introductory Note 9: “Whereas more than half of fixed-term workers in the European Union are women and this agreement can therefore contribute to improving equality of opportunities between **women** and men”. Accordingly, Clause 4 of the Framework Agreement establishes the so-called “principle of non-discrimination”. Clause 4(1) states: “In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds”. Similarly, Article 4(1) of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-Time Work states: “In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds”. It should be noted in this context that about 80 per cent of all part-time jobs in Europe are occupied by women.

In addition, Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation prevents the discrimination of persons residing in the European Union on the grounds of **race** and **ethnic origin, religion or belief, disability, age or sexual orientation**. The two Directives define a set of principles that offers all persons residing in the EU a minimum level of legal protection against discrimination.

The free movement of workers is one of the fundamental freedoms guaranteed by the Treaty of the European Union. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services guarantees that the rights and working conditions of a “**posted worker**” (a worker who, for a limited period, carries out his or her work in the territory of a Member State other than the state in which he or she normally works) are protected throughout the European Union. To this end, EU law has established a core of mandatory rules regarding the terms and conditions of employment applicable to an employee posted to work in another Member State. These rules reflect the standards of local workers in the host Member State. However, according to a line of decisions of the European Court of Justice, Member States may not insist on terms and conditions of employment that go beyond the core of mandatory rules. The protection of these workers must be balanced against the fundamental freedoms provided by the Treaty.

Germany – The opposition parties in the Federal Parliament have recently been demanding legislation which prevents employers from offering **youths** internships instead of “regular” contracts of employment. In particular, they call for the establishment of a claim to “fair” remuneration for trainees with a degree, to oblige the parties concerned to conclude a trainee agreement in writing, and to (partially) shift the burden of proof to make it easier for interns to prove before a court that their internship was a sham and that they in fact worked under a contract of employment.

In the **Netherlands**, on-call workers are mostly **women** working in shops, hotels, restaurants, hospitals, food factories, etc. They perform the same work as regular employees, but are not treated like them: they are either not given an employment contract at all because they are free to refuse the call to report to work or they get a so-called “zero-hour” contract which has the effect of an employment contract void of any content. After uncertainties in the 1990s, a legislative solution was found. Since January 1999, if the employment is regular and continuous, the burden of proof is reversed and it is for the employer to prove that the person is not an employee. Also, the law introduced a second presumption concerning the volume of work agreed upon in order to avoid abuse of the “zero-hour” contract: when an employment contract lasts for at least three months, the work agreed upon is presumed, in a given month, to be of a volume equal to the average amount of work performed in the three preceding months. Another new regulation is that in case of uncertain working hours of less than 15 hours per week, the employee has to be paid for at least three hours for every call. And finally, the number of consecutive fixed-term contracts is limited and the period of interruption has been extended to three months. As a result, these types of contracts have become less popular.

Norway – The work of “au-pairs” is statutorily defined as constituting a hybrid of cultural exchange and domestic work. Accordingly, “au-pairs” are neither employees nor self-employed persons.

Spain – The Spanish system usually contains measures to promote employment of women, young persons, disabled and older workers (especially through the reduction of social security contributions). For all of them Spanish law also provides special safety and health at work measures: workers under 18 have special limitations with regard to working time. The older workers have a possibility of early retirement and partial retirement (from age 61 usually), although the Spanish system also provides incentives for continued employment after retirement age. Domestic work in exchange for wages (performed predominantly by women) is governed by special labour standards, but its content is very close to the common labour law. Foreign workers with residence permits have the same rights as Spanish workers. There are various types of aid to promote the social integration of immigrants. To combat illegal employment, the Government periodically approves special plans for monitoring and control measures.

R 198 Paragraph 4:
National policy should at least include measures to: (a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the **distinction between employed and self-employed workers.**

6. Employment relationships and genuine civil and commercial relationships

Where attempts are made to disguise an employment relationship, workers could be deprived of the protection they are due. Trust in the legal system suffers if national policy is unable to effectively address the difference between fraudulent practices and genuine civil and commercial business relationships. Moreover, adjusting to recent changes in work organisation, some European systems have developed new concepts such as ‘parasubordinate’ or ‘quasi-salaried’ workers (**Italy, Germany**) to describe persons who are working outside the traditional framework of an employment relationship, yet are nonetheless in need of protection.

R 198 Paragraph 8:
*National policy for protection of workers in an employment relationship should not interfere with **true civil and commercial relationships**, while at the same time ensuring that individuals in an employment relationship have the protection they are due.*

Poland – Article 22 Clause 1 – Clause 1² of the Labour Code:

By establishing an employment relationship, an employee undertakes to carry out a certain type of work for the benefit and under the guidance of an employer, and an employer undertakes to employ an employee in return for remuneration. Employment in accordance with the terms specified in Clause 1 shall be an employment under an employment relationship, regardless of the designation of the contract concluded by the parties. It shall not be permitted to replace an employment contract with a civil law contract where the terms upon which the work is to be provided are those specified in Clause 1.

Slovenia – Article 11(2) of the Employment Relationships Act:

Where there are elements of the employment relationship pursuant to Article 4 [definition of the employment relationship], work may not be performed on the basis of civil law contracts, except in cases provided by law.

Austria – The law defines a specific category of economically dependent workers, so-called ‘employee-like persons’. The relevant statutory provisions apply to persons who perform work or services by work or service order and on account of another person without having concluded an employment contract, and who are to be considered employee-like persons because of their economic dependence. Criteria by which such economic dependence can be established include: work performed for a single or very limited number of contracting parties, using no relevant operating resources of one’s own, and dependence on the earnings for one’s livelihood. The individual is not considered to require social protection equal to that of a ‘genuine employee’. A limited number of labour law provisions apply to employee-like persons based on explicit decrees, e.g. decrees relating to labour courts, temporary agency work, employee liability and anti-discrimination. Others are applied by the courts insofar as they do not include personal subordination, e.g. work place health and safety. Consequently, important aspects of labour law (in particular, laws on dismissal protection, paid holidays and sickness benefits) are not applicable to employee-like persons.

Belgium – “Employee-like persons” (or quasi workers) are also recognised in Belgium for the application of social security laws (Royal Decree of 28 November 1969). These persons are not legally subordinated as ‘employees’, but are “economically dependent”.

Germany – “Employee-like persons” (or quasi workers) are also recognised in Germany (so-called arbeitnehmerähnliche Person). These persons are not “personally dependent” or “subordinated” like ‘employees’, but are “economically dependent” only (Federal Labour Court of 15.11.2005 – 9 AZR 626/04). Persons who belong to this group are considered to form a sub-category that is in need of stronger protection than that provided to the majority of self-employed persons. Some of the legal protection afforded to employees is, accordingly, extended to employee-like persons. Employee-like persons are entitled to annual leave and to protection under the rules on the prevention of discrimination. Further, labour courts have jurisdiction in relation to employee-like persons, and the general terms and conditions of their contracts are subject to judicial supervision. Finally, employee-like persons are entitled to collective bargaining. The essential features of the category of employee-like persons are statutorily established in Section 12a of the Act on Collective Bargaining Agreements. The criteria enumerated in the relevant provision are:

- (1) economic dependence (as opposed to personal dependence or subordination);
- (2) the need for social protection; because
- (3) the work is performed in person essentially without the aid of subordinate employees; and because
- (4) either the work is primarily performed for one person, or the worker relies on a single entity for more than half of his or her total income.

However, it should be noted that the term 'employee-like person' differs slightly from one statute to another and that only individual rules and provisions of labour law are (by way of analogy) made applicable to quasi workers. Consequently, labour law is, in principle, not applicable to them (Federal Labour Court 8 May 2007 – 9 AZR 777/06). In particular, neither statutory dismissal protection nor legal protection in case of a business transfer can be applied.

France – Under the relevant provisions (L 7321-1 Code du travail), certain individuals who own a one-person enterprise benefit from the regulations of the Labour Code. The criteria included in these provisions are mainly economic: exclusive or quasi-exclusive activity for a dominant company which imposes the prices paid to the one-person enterprise. These provisions enable the application of the Labour Code in the absence of unambiguous subordination. Examples for its application include managers of petrol stations, licensees, exclusive distributors and, more recently, franchisees.

Greece does not officially recognise economically dependent workers, except insofar as the labour laws provide that: (a) a person is presumed to be performing dependent work if the person works only or mainly for the same employer, i.e. when he or she is economically dependent (see Art 1 of Law 1876/1990, the rule concerning the presumption of dependent work is laid down in Art 1 of Law 2639/1998 as amended by Art 1 of Law 3846/2010) ; and (b) economically dependent workers have the right to conclude collective agreements. This right had not been exercised as at the time of writing.

Italy – Economically dependent work relationships are principally composed of cooperative relationships under which a worker performs 'employer-coordinated freelance work' or 'project work' (see Legislative Decree No. 276 of 2003; see also Article 409 of the Code of Civil Procedure). Salaries paid to such workers must be proportional to the quantity and quality of the work performed and must reflect the salaries usually paid for similar services under an employment relationship (characterised by subordination) in accordance with national collective agreements (Article 1 Paragraph 772 of Act No. 296 of 2006).

Portugal – The Labour Code establishes specific rules for situations equivalent to employment contracts ("contratos equiparados"). Article 10 states that "the legal rules regarding personality rights, equality and non-discrimination, labour safety and health, shall apply to situations in which professional activity is performed by a person for another in the absence of legal subordination, but in circumstances where the provider should be considered economically dependent on the activity's beneficiary". This extension is applicable to homework ("trabalho no domicílio"), governed by

Law No. 101/2009 of September 8, 2009. This legal framework also applies to a worker who performs his or her activity with the assistance of a family member in his or her residence or, if the activity must be performed outside his or her residence for safety or health reasons, in any place other than at the premises of the activity's beneficiary (Article 1 no. 3). Among others, special rules apply to privacy and rest (Article 4), safety and health (Article 5), professional training (Article 6), remuneration (Article 7), annual allowance (Article 8), and suspension, reduction or termination of the contract (Articles 9 to 11). In addition, the worker and the beneficiary of his or her activity are covered by the general social security regime of dependent employees, as established in special legislation. Under that legislation, the worker and the beneficiary of his or her activity are regarded respectively as beneficiary and contributor for the purposes of social security payments (Article 15).

Spain – A specific category of economically dependent self-employed workers was recognised by the legislator under the Autonomous Labour Statute of 2007. The main features of this category of economically dependent self-employed workers are: (a) performance of a professional activity directly and in person, primarily for one client only, on a regular basis and in exchange for remuneration; and (b) economic dependence on that client, receiving at least 75 per cent of all income generated by their work or professional activity or business from that client. To be considered economically dependent, the worker may not engage employees, nor contract or sub-contract the given activity to third parties; he or she may not provide the exact same services to the client as the client's employees; the worker must have his or her own place of work, equipment and materials; must develop the activity under his or her own management; must receive remuneration in accordance with the results achieved by his or her activity and bear the relevant risks; may not open his or her offices or premises to the public, nor develop the activity as a corporation. Although commercial agents are explicitly excluded from the application of labour law on the basis that they are "autonomous", workers who are considered "economically dependent" based on these criteria are entitled to some of the protection afforded to "employees". "Economically dependent self-employed" workers (TRADE) enjoy some rights that are similar to those of employees (including annual leave, absence from work for family reasons, or severance payments), though their extent and effectiveness depend on what was agreed in the contract. They also enjoy organisational rights and the right to take collective action. In addition, working conditions can be fixed through collective bargaining ("professional interest agreements").

Sweden – The law recognises the category of dependent contractors in relation to collective labour law based on economic dependence. According to Section 1(2) of the Co-determination Act (1976:580) "the term 'employee' [...] shall also include any person who performs work for another without thereby being employed by that other person who, however, occupies a position of essentially the same nature as that of an employee. In such circumstances, the person for whose benefit the work is performed shall be deemed the employer." The significance of this rule is diminishing, however, due to the fact that the notion of 'employee' is relatively broad. Labour courts are sensitive to attempts to circumvent labour law legislation and regularly rule in favour of the existence of an

employment relationship if the person in question has gone from being an employee of the employer to becoming an 'alleged' self-employed worker.

In the **United Kingdom**, the law differentiates between five categories: (1) employees, (2) workers, (3) professionals, (4) dependent entrepreneurs, and (5) self-employed persons. The legal definition of a "worker" (section 230(3) Employment Rights Act 1996) is a broader category than that of an "employee" (section 230(1) Employment Rights Act 1996), which is limited to "an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment". The concept "worker" covers not only employees, but also those who work under a contract of personal service yet do not provide that service in the capacity of a professional or independent business. Such workers are often referred to as "dependent self-employed", a category that may include freelance workers, sole traders, home-workers and casual workers. The principal rights enjoyed by "workers" are those relating to the minimum wage, working time, part-time work, and protection under the whistle blowing legislation. Since the category of workers includes employees, rights enjoyed by workers are also enjoyed by employees. The definition of a "professional" includes employees, workers and those providing a personal service as a professional (e.g., solicitors). In principle, professionals have rights under the equality legislation. "Dependent entrepreneurs" also have certain rights, in particular relating to health and safety legislation, according to which dependent entrepreneurs are defined as individuals who work for gain or reward otherwise than under a contract of employment, whether or not he or she employs others. While employees are defined by reference to the fact that they are employed under a contract of service, self-employed persons have a contract for services.

Romania – Prior to the implementation of the present Labour Code in 2003, the practice of concluding civil contracts to disguise employment contracts was so widespread that it was considered an actual social phenomenon. In response, the legislator adopted measures to discourage the conclusion of civil contracts ("contracts for services"), to the point that such contracts were almost prohibited. Further, the Tax Code was modified in 2010, providing the possibility for tax authorities to control the genuineness of civil contracts and to combat false labelling of employment relations. New tax regulations adopted in 2010 (Emergency Governmental Ordinances 58 and 82) provide four criteria that can be applied by the tax authorities: subordination, exclusive use of the employer's tools, payment of daily allowance in case of temporary displacement, and payment of holidays and sick leave. Where any of these criteria are met, the tax authorities may consider the civil contract to be an employment contract, and require the parties to retroactively honour the tax obligations that arise from an employment contract.

On the other hand, the Labour Code in **Slovakia** explicitly allows employers to conclude so-called "work performance agreements" for the performance of tasks outside an employment relationship. Such contracts are designed for arrangements under which work is to be measured by results (task contracts) or occasional activities during which a particular type of work is to be performed (agreement on work activities, agreement on temporary work for students). An employer may conclude a "work performance

agreement” if the anticipated extent of the work tasks for which the agreement is concluded does not exceed 350 hours in a calendar year.

Hungary – The early draft of a new Labour Code contained rules on persons having similar status as employees. The draft regulation read as follows:

With regard to the totality of the circumstances of the case, a person who does not work for another person on the basis of an contract of employment shall be regarded as a person with a status similar to that of employee (worker) if *a)* she/he works for another party in person, for reward, regularly and on a long-term basis, and *b)* against the background of the fulfilment of the given contract, he cannot be expected to engage in any other regular, gainful activity.

The original intention was to all provisions relating to leave, notice periods, severance pay and liability for damages as well as the provisions relating to the mandatory minimum wage to be applied to a “person with a status similar to employee”. However, this draft was refused by both the employer’s associations and the trade unions.

R198 para 7(b):

where workers are recruited in one country for work in another, the members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship

7. Transnational provision of services

Free movement of workers is enshrined in Article 45 of the Treaty on the Functioning of the European Union and has been derived from EU secondary legislation as well as from the case law of the Court of Justice. With regard to 'posted workers' (i.e. workers who, for a limited period, carry out their work in the territory of a Member State other than the State in which they normally work), Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services has established a set of mandatory rules regarding the terms and conditions of employment to be applied to an employee posted to work in another Member State. The basic idea is that where a Member State has certain minimum terms and conditions of employment in either legislation or collective agreements, these must also be applied to workers posted to that State. However, the employer is not prevented from applying working conditions which are more favourable to the worker.

Article 3: Terms and conditions of employment

1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

– by law, regulation or administrative provision, and/or

– by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination.

For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

II. Determining the existence of an employment relationship

R 198 Preamble:
Protection of workers is at the heart of the ILO's mandate, the principles set out in the Declaration on Fundamental Principles and Rights at Work, 1998 and the Decent Work Agenda.

Laws and regulations, and their interpretation, should be compatible with the objectives of decent work because they seek, among other things, to address what can be an unequal bargaining position between parties to an employment relationship

R198 Paragraph 11:
For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following: (...)

The following examples are indicative of laws and practices relevant to the determination of an employment relationship, and are not intended to be exhaustive. The first group of examples (Practical methods) comprises methods that are commonly used today to establish an employment relationship. The second group of examples (Criteria for identifying an employment relationship) describes specific indicators used in different national contexts.

A. Practical methods

1. Legal presumption

Some legal systems have established presumptions regarding the existence or non-existence of an employment relationship. However, different approaches have been used. There may be a broad presumption that all relationships are employment relationships and a worker making a claim is not required to produce evidence to prove the existence of an employment relationship (Netherlands). On the other hand, the law may specify one or several indicators, if a claimant seeks to prove the existence of an employment relationship. Some countries apply statutory presumptions as to the non-existence of an employment contract.

Statutory presumption

In many countries, statutory presumptions in favour of an employment relationship exist. In other countries, statutory presumptions are applied to specify the non-existence of an employment contract.

In the **Netherlands**, far-reaching presumptions in favour of an employment relationship exist. Two legal presumptions were included in the Flexibility and Security Act adopted on 14 May 1998, with a view to strengthening the legal status of flexi-workers. If an employee works for an employer on a regular basis for a period of three months (weekly or at least 20 hours a month), then the law automatically presumes that a contract of employment exists. If there is no specific agreement on working hours, the number of hours worked per month over the three previous months is taken to be the number of hours stipulated in the contract of employment.

(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present (...)

If the employer disagrees, the employer is at liberty to produce evidence to the contrary regarding both presumptions.

Portugal – Article 12 of the Labour Code establishes a rebuttable presumption upon the conclusion of an employment contract:

... the existence of an employment contract is presumed when, in the relationship between the person that provides an activity and the other (or others) that benefit from it, some of the following elements occur: a) the activity is held in a place that belongs to the beneficiary of the activity or in a place determined by him; b) the equipment and working tools belong to the beneficiary of the activity; c) the person that provides the activity complies with a specific time to start and finish the supply, as determined by the beneficiary; d) an amount is paid to the provider, with a certain regularity, in return for the activity performed; e) the provider performs management or leadership functions in the company.

Spain – A rebuttable presumption applies to the employment status of a person who provides a service in exchange for remuneration at the risk of, and under the management and within the organisational sphere of, another person who is the beneficiary of that service (Article 8(1) of the Labour Code, “Estatuto de los Trabajadores”, RDLeg. 1/1995, 24 March 1995). In 2007, Spanish law introduced a definition for self-employed workers as persons who, on a regular basis, directly and personally carry out a professional activity or business at their own risk, outside of another person’s management and organisational sphere and in exchange for remuneration, regardless of whether he or she engages employees (Article 1 of the Labour Code).

A relatively weak presumption of an employment relationship exists in **Slovenia**. The law explicitly stipulates that in cases of disputes relating to the existence of an employment relationship between a worker and an employer, the relationship is presumed to represent an employment relationship if it features the basic characteristics of an employment relationship.

In **Estonia**, according to Article 1(2) of the Employment Contracts Act, a person is presumed to be working under an employment contract if he or she performs work for another person that, according to the circumstances, can be expected to be done only for remuneration. However, the provisions concerning employment contracts do not apply to contracts where the person performing the work is, to a significant extent, independent in choosing the manner, time and place of performance of the work (Article 1(4)).

The law in **Romania** has recently been amended to provide that employment contracts must be written in order to be valid. Although there is not yet any jurisprudence on the issue, it may no longer be possible to establish the existence of an employment relationship in the absence of a written contract.

Malta – Legal Notice 44 of 2012 amended by Legal Notice 110 of 2012 which came into force on 31 January 2012 reviews the employment status of individuals who are self-employed and defines a number of criteria which would indicate the existence of an employment relationship. The Order stipulates that if five of the following eight conditions are met the

individual would be considered to be an employee with comparable conditions of employment. The criteria are as follows:

- (a) the individual derives at least 75% of his income for the year from one source;
- (b) the type and volume of work required are determined by the person to whom the service is provided;
- (c) the tools, equipment and materials required for the work are provided by the person receiving the service;
- (d) the individual is subject to work time schedules or minimum work periods which are set by the person receiving the service;
- (e) the individual must perform the service himself and cannot subcontract the work to others;
- (f) the individual is integrated within the production process or work organisation or hierarchy of the entity requiring the service;
- (g) the activity performed by the individual is a core element in the organisation and the pursuit of the objectives of the person to whom the service is provided;
- (h) the individual performs similar tasks to existing employees or, where work is outsourced, to those performed by former employees.

Judge-made law

Even if no statutory presumptions exist, which is the case in many European countries, the existence of certain factors may prompt national courts to decide that a given relationship is an employment relationship. In order to improve the legal position of persons who claim to be employees, the courts in some countries generally seem inclined to consider relieving the burden of proof under certain circumstances.

In **Denmark**, for example, a contract that is treated by its parties as an employment contract with regard to income tax is also presumed to be an employment contract by the courts with reference to labour law.

In other countries, however, certain factors may lead the courts to assume that no employment contract exists. If, for instance, a person is treated as being self-employed with reference to tax issues, courts in **Romania** are unlikely to qualify the underlying legal relationship as an employment contract.

R 198 Paragraph 11:
For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the

2. Determining whether designated groups of workers (e.g. by sector) are either employed or self-employed

Determining whether designated groups of workers are either employed or self-employed can be achieved in several ways. For example, the minister may be given a general discretion by law to designate a specific group or groups to a particular employment status (i.e. employment or self-employment), or a statute may directly designate the employment status of a specific group or groups of workers. Such designations of the employment status may be subject to certain conditions or prerequisites. Alternatively, judicial decisions may result in a general acceptance that a

following: (...)
(c) determining,
following prior
consultations with the
most representative
organizations of
employers and
workers, **that**
workers with certain
characteristics, in
general or in a
particular sector,
must be deemed to
be either employed or
self-employed.

particular group of workers is employed or self-employed for the purposes of the labour law.

In **France**, the Labour Code provides for the application of the provisions of the Labour Code to workers other than those with an employment contract. The Labour Code explicitly defines any agreement under which professional journalists, performing artists, fashion models or sales representatives provide their services within the scope of a contract of employment. For instance, agreements between sales representatives (freelance workers) and their 'clients' are considered contracts of employment, if certain conditions regarding their activity are met. Each contract between a sales representative and one or more organisations that complies with the specified conditions is deemed a contract of employment. There is no room for reversing this presumption by proving that there was no subordination (Labour Code Article 7311-1 and 7311-3):

Labour Code Article L. 7311-1

The provisions of this Code shall apply to the travelling salespersons, representatives and insurance brokers, subject to special provisions of this title.

Labour Code Article L. 7311-3:

A travelling salesperson, representative and insurance broker, is any person who: (1) works for one or more employers, (2) works exclusively and continually in the area of representation, (3) does not carry out any commercial activity on their own account, (4) is bound to their employers by commitments concerning the nature of the services rendered or of the merchandise offered for sale or to be purchased, the region where they must exercise their professional activity, the categories of clients whom they must contact, or the rate of remuneration.

Also in **France**, the Supreme Court examined the case of a person who drove a taxi under an automatically renewable monthly contract in the Cour de Cassation Ruling No. 5371 of 19 December 2000. In this case, the taxi driver's contract was, referred to as a "contract for the lease of a vehicle equipped as a taxi", and paid a sum described in the contract as "rent". Despite these contractual terms, the Court held that this contract concealed a contract of employment, since the taxi driver was bound by numerous strict obligations concerning the use and maintenance of the vehicle and was in a situation of subordination. In Ruling Nos. 5034, 35 and 36, of 4 December 2001, the Supreme Court examined the case of workers engaged in the delivery and collection of parcels under a franchise agreement. The "franchisees" collected the parcels from premises rented by the "franchiser" and delivered them according to a schedule and route determined by the latter. In addition, the charges were set by the enterprise, which collected payment directly from the customers. The Supreme Court examined the situation of three "franchisees" in three separate cases and handed down three rulings on the same day according to which the provisions of the Labour Code were applicable to persons whose occupation consisted essentially of collecting orders or receiving items for handling, storage or transport on behalf of a single industrial or commercial enterprise, when those persons performed their work in premises supplied or approved by that enterprise, under conditions and at prices imposed by that enterprise, without the need to establish a subordinate relationship. This is understood to amount to an extension of the scope of the Labour Code to certain "franchised" workers.

Spain – Commercial agents can either work under a commercial contract or under an employment contract. In principle, the parties are free to choose one or the other. However, if the activity meets the features of the Workers' Statute, there will be an employment contract, even if the parties declare otherwise. On the other hand, if the worker performs the work “autonomously” (for example, the worker determines his or her own working hours) and is responsible for the success of the operation, the contract is deemed to be a commercial contract. Professional athletes and performing artists are deemed to be employees in all circumstances when they work for a club or a firm which pays them (Labour Code 1995 compilation Section 2(1) (d) and (e) and Spanish Royal Decree 1438/1985 regulating the special employment relationship of professional athletes and performing artists).

In **Greece**, two specifically designated groups of persons exist who are legally deemed dependent employees, namely tourist guides and technicians in cinema and broadcasting. The law provides that they are deemed to be employed, irrespective of the given features of the work they perform (see Article 37 of the Greek Act 1545/1985, Article 2(1) of the Greek Act 358/1976 and Article 6(5) of the Greek Act 1597/1986).

In some countries, like **Luxemburg**, courts generally determine that specific types of work, such as cleaning, are performed under an employment contract, and thus deduce from the type of work performed whether an employment contract exists.

In the **United Kingdom**, Section 23 of the Employment Relations Act of 1999 authorises the Secretary of State to make provisions which have the effect of conferring rights which arise from labour law on individuals who are of a “specified description”. However, this provision had not been used at the time of writing.

3. Employer's obligation to inform of employment conditions

Another practical method of increasing certainty regarding the formation of an employment relationship is the imposition of an obligation on the employer to inform employees of the conditions applicable to their contracts in writing. This obligation may be fulfilled by providing a written contract, a letter of engagement or other documents indicating the essential aspects of the employment contract or relationship.

This obligation is explicitly set forth in EU legislation:

European Union Council Directive 91/533/EEC of 14 October 1991:⁶ Article 2(1) – Obligation to provide information: “An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as “the employee”, of the essential aspects of the contract or employment relationship.”

Article 3 – Means of information: (1) The information referred to in Article 2 (2) may be given to the employee, not later than two months after the commencement of employment, in the form of: (a) a written contract of employment; and/or (b) a letter of engagement; and/or (c) one or more

⁶ Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (*OJ L 288, 18.10.1991, p. 32-35*)

other written documents, where one of these documents contains at least all the information referred to in Article 2 (2) (a), (b), (c), (d), (h) and (i).

France – Cour de Cassation, Chambre sociale, 23 March 2011, No. 09-68.078: The court held that the employer is obliged to inform the employee of the applicable collective bargaining agreement. If a collective bargaining agreement is mentioned on the employee's pay slip, that particular agreement is considered applicable and the employee has the right to request its implementation.

R 198 Paragraph 9:

*For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided **primarily by the facts** relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.*

4. Primacy of facts

In nearly all European countries, the practical implementation by the parties of the employment contract is decisive for its legal classification. Determination of the existence of an employment relationship is guided by the *facts* of what was actually agreed and performed by the parties, and not on how either or both of the parties designate the relationship. According to the principle of the primacy of facts, the contract is evaluated based on an independent in-depth court assessment regarding the actual substance of the relationship. As a result, the parties to a contract cannot avoid the application of labour law by choosing another “label” for their contract. In almost all countries, courts indeed reclassify contracts, although with varying intensity. In some countries, the courts may conclude that a contract was implicitly modified by the parties if the practical implementation of the contract differs from the contractual stipulations used by the parties.

Italy – According to well-established case law, in cases of dispute over the characterisation of the employment relationship, the courts must assess the facts relating to the performance of work.

Poland – According to Article 22 Section 1¹ of the Labour Code, employment refers to employment under an employment relationship, regardless of the name of the contract concluded by the parties. Under Article 22 Section 1² of the Act, replacing an employment contract with a civil law contract is not permissible.

Ireland – *Henry Denny & Sons Ltd. v. Minister of Social Welfare* [1998] 1 I.R.34: The case dealt with the question of whether a shop demonstrator was an employee. In this case, the Supreme Court affirmed that the actual substance of the relationship overrode statements in the worker's contract regarding the type of relationship the contract sought to establish. These statements included assertions such as: “*You are deemed an independent contractor*”; “*It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise*”; “*It is agreed that the provisions of the Unfair Dismissals Act 1977 shall not apply, etc.*”; “*You will not be an employee of this company*”; and “*You will be responsible for your own tax declaration*”. Rather than being determinative of the employment status of the person engaged under the contract, the Supreme Court that these statements “purported to express a conclusion of law as to the consequences of the contract between the parties”. As such, they were not valid contractual terms and did not impact on the reality of the relationship, which was found to be one of employment.

In the **United Kingdom**, a contract automatically qualifies as a contract of employment if the practical implementation of the contract by the parties points to the existence of a contract of employment. There is relatively widespread use of several contractual measures, including ‘relabeling clauses’, aimed at excluding employee status. A clause may state, for instance, that “*for the avoidance of doubt, these terms shall not give rise to a contract of employment [...] and therefore the [worker] will not have the statutory rights accorded to employees*”. The courts will examine whether such clauses genuinely reflect the reality of the situation (*Protectacoat Firthglow v. Szilagyi* [2009] IRLR 365; *Autoclenz v. Belcher* [2011] UKSC 41). This includes looking ‘beyond and beneath’ the documents about what the parties have said and done, both at the time when they were engaged and subsequently, including evidence about how the relationship was understood by them (see *Raymond Franks v. Reuters Limited* [2003] IRLR 423, Para. 12; per Mummery LJ).

Netherlands – In *Groen/Schoevers* (HR 14 November 1997, NJ 1998, 149, JAR 1997, 263), the plaintiff originally agreed to be self-employed, but later claimed employment status by invoking the employment protections of the labour law. The Supreme Court ruled the objective of the parties when concluding the contract, including the way in which they elaborated the agreement, may be a decisive factor in determining the legal status of a work relationship. However, the objective can be contradicted by the existence of a subordinate relationship of such a form and extent that, despite the earlier findings in the case, it must be concluded that a contract of employment exists. The court considered the social position of the worker in this case.

Luxemburg – Courts only examine how a given contract is actually implemented. A contract or relationship between two parties can thus be reclassified by a court in either way. The courts have outlined several criteria that determine the existence or non-existence of an employment contract, which can be referred to as indicators. Courts arrive at their decision based on these multiple indicators. Such indicators may include: a regular working time, no ownership of the tools, a fixed place of work, being subjected to the authority of another person, precise instructions being given by the employer, an obligation to carry out the work personally, fixed salary, regular remuneration, existence of pay slips, registration as an employee with the social security system, no financial risk, references to the provisions and rules of labour law, etc.

France – Cass. Soc. 19 May 2009 No. 07-44.759: “Existence of an employment relationship depends neither on the will of the parties to a contract nor on the designation of this contract, but on the circumstances under which the work is performed (...).”

The principle of primacy of facts also exists in **Germany**. However, it is applied only in favour of the employee. Consequently, if the parties to a contract use the label “employment contract”, such a contract is regularly assumed to exist, even if the practical implementation of the contract points to the existence of a different type of relationship (Federal Labour Court of 12.09.1996 – 5 AZR 1066/94). In addition, German law explicitly rules that in the absence of a relevant agreement, and if the work performed by one of the parties could not be expected to be performed

without remuneration, such remuneration is deemed as fixed by the parties, in accordance with the facts of the individual case:

Section 612 German Civil Code: (1) Remuneration is deemed to have been tacitly agreed if under the circumstances it is to be expected that the services are rendered only for remuneration. (2) If the amount of remuneration is not specified, but a tariff exists, the tariff remuneration is deemed to be agreed; if no tariff exists, the usual remuneration is deemed to be agreed.

Bulgaria – The “primacy of facts” is a general principle of contractual law. Article 20(1) of the Obligations and Contracts Act specifies: “The actual common will of the parties shall be sought in the interpretation of contracts. The individual provisions shall be interpreted in terms of their interrelation and each one of them shall be interpreted within the meaning ensuing from the contract as a whole, taking into account the objective of the contract, use, and good faith”.

Iceland – When a distinction is made between an employment relationship and self-employment, the name or form of the contract is not the determining factor, but rather the nature or substance of the relationship. The conclusion is based on a general assessment of the content of the contract as a whole. One example is the Supreme Court judgment in Case No. 381/1994, where the given employment contract specifically stated that the plaintiff was considered a self-employed contractor. Regardless of the stipulations of the contract, the Supreme Court considered the plaintiff to be an employee on the basis that he had received a fixed monthly salary which changed in accordance with the applicable collective agreements, and that the contract did not specify a particular task to be performed, but rather particular types of tasks which the plaintiff was to carry out personally within the firm.

Hungary – Section 75a of the former Labour Code provided:

(1) The type of contract underlying an employment relationship may not be chosen with a view to restricting or violating the provisions that provide for the protection of the employee's rightful interests. (2) The type of contract, irrespective of the name, shall be chosen so as to best accommodate all applicable circumstances, such as the parties' prior negotiations and their statements made at the time of contracting or during the performance of work, the nature of the work to be performed, and the rights and obligations set out under Sections 102-104.

The new Labour Code does not contain a similar regulation but the above-mentioned rules are still applied as judge-made law. The significance of the principle of the primacy of facts has been emphasised by the courts on various occasions, such as in Case BH2002.04, in which the court stated that “contracts shall be considered with reference to their contents rather than to their name”. In Case BH2003.432, the court held that “if an employment relationship existed with reference to the content of the contract concluded between the employer and the private individual, it is not possible to withdraw it from the rules of labour”. In addition, the court determined that the freedom of contract only covered the determination of the content of the contract by the parties, without encompassing the right to freely qualify the contract by giving it a specific name.

Belgium – In Belgium, the principle of the primacy of fact also exists, but it does not play as important a role as it first appears. According to the well-established case law of the Belgian Cour de Cassation since 23 December

2002 (*JTT* 2003, 271; Cass. 28 April 2003, Cass. 3 May 2004, Cass. 17 December 2007, Cass. 23 March 2009, Cass. 25 May 2009), the starting point for determining the true nature of the employment relationship is the classification provided by the parties to the contract. Only if the performance of the contract is in obvious contradiction to, or incompatible with, this qualification may the judge reclassify the employment relationship. This case law was consolidated by the Programme Act of 27 December 2006 (Article 331 and 332).

B. Criteria for identifying an employment relationship

The criteria for identifying an employment relationship may vary and the criteria listed below are not intended to be exhaustive. The weight given to criteria may also vary depending on their applicability or appropriateness to the particular type of employment. However, the most important criteria include: control, integration, dependence, financial input or risk, and mutuality of obligations.

In order to determine whether an individual is an employee, the courts conduct an overall assessment of the situation, taking account of all relevant factors of the individual case.

In **Germany**, for instance, the term “employee” is considered a mere reference to a particular type of employment relationship. Consequently, the law assumes that the requirements for an “employment relationship” do not necessarily have to all be met in each individual case. On the basis of this “typological method”, the courts have actually gone so far as to claim that there is no single key criterion among the many criteria to be applied in the process that could be considered indispensable. In the courts’ view, even subordination does not represent an indispensable requirement (Federal Labour Court 15.03.1978 – 5 AZR 819/76 – and 13.01.1983 – 5 AZR 149/82). Instead, various criteria are used as indicative of the existence of an employment relationship. The basis for this is a “general evaluation”, meaning that the courts apply a “holistic view” (see, for instance, Federal Labour Court 23.04.1980 – 5 AZR 426/79).

In **Greece**, the courts emphasise the importance of a “qualitative” assessment of the work relationship. In this context, the central question of whether the worker’s engagement and dependence are such that they “require providing protection by the rules of labour law” (see Supreme Court 28/2005 (Plen) and Supreme Court 1688/2007).

In **Portugal**, the courts apply a ‘facts index’ system according to which an overall assessment on the facts has to be conducted.

R 198 Paragraph 12:

For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an

1. Subordination or dependence

In all European countries, the main criterion for establishing an employment relationship or an employment contract is that one individual is subordinate to or dependent on another. Situations vary across countries. In some countries, these two terms are co-extensive; in others, they can be differentiated. Many countries use the term “personal dependence”, while others use the term “legal dependence” or “subordination”.

employment
relationship, for
example,
**subordination or
dependence.**

(a) Subordination

Italy – Articles 2094 and 2222 of the Civil Code define the criteria of subordination and introduce the distinction between subordination and autonomous work. Control characterises subordination, while dependence is characterised by economic dependence, whether or not control over the method of the performance of work exists. The Supreme Court recently held that “an unfailing element of a subordinate employment relationship is subordination, intended as a form of personal submission by the employee to the managing power of the employer that is inherent in the ways one performs one’s work rather than simply in the result; on the contrary, the other elements of the employment relationship (such as collaboration, observance of a given working time, continuity of the services rendered, inclusion of the respective services in the business organisation and coordination with the entrepreneurial activity, the lack of risk for workers and their salary) are incidental. These factors should be taken into consideration as a whole and, in any case, in relation to subordination.” (Cassazione Civile, sez. lav., December 1, 2008, No. 28525).

France – Subordination is characterised by the “execution of work under the authority of an employer who has the power to give orders and directives, to control their execution, and to sanction the breaches of the subordinates” (see Cour de Cassation 16 November 1996).

Finland – Employment Contracts Act Chapter 1, Section 1(1):

This Act applies to contracts (employment contracts) entered into by an employee, or jointly by several employees as a team, agreeing personally to perform work for an employer under the employer’s direction and supervision in return for pay or some other remuneration.

The most important element of an employment relationship is the employer’s right to direct and supervise. Some amount of direction and supervision must exist or the employer must at least have a possibility to lead and supervise the work. The Finnish Supreme Court case 1999:113 examined the “employee status” of a Salvation Army officer. The Court held that the existing contract included all the statutory elements of, and was consequently to be regarded as, a contract of employment.

Portugal – Article 11 of the Labour Code defines the employment contract as an agreement “in which a natural person undertakes, for remuneration, to provide an activity for another or others, within an organisation and under its authority”. The indirect reference to legal subordination (“under its authority”) underlines the fact that subordination serves as the main criterion to distinguish an employment contract from other, similar contracts.

(b) Dependence

Czech Republic – A person is an “employee” if he or she performs “dependent work”. The statutory definition of “dependent work” is contained in Section 2(1) and (2) of the Czech Labour Code. According to Section 2(1) of the Labour Code, “dependent work” is work performed in a relationship of employer superiority and employee subordination, carried out in the name of the employer, according to instructions of the employer and the employee shall perform it in person. According to Section 2(2) of the Labour Code, “dependent work” shall be carried out for a wage, salary

or remuneration for work, at the employer's costs and liability, during working hours at the employer's workplace, or at other agreed site."

Slovakia – Dependence is the main criterion. According to Article 11(1) of the Labour Code (Act No. 311/2001 Collection of Laws), "an employee shall be a natural person who in employment relations and (if specified by special regulations also in similar relations) performs dependent work for the employer".

R 198 Paragraph 13:

Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include: (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

2. Control of the work and instructions

One of the principal indicators of subordination is control, since the primary "consideration" upon which employers bargain is the right of control, i.e. the power to direct the worker to suit the changing needs of the labour process. Control over the work and the employer's power to supervise the employee plays a key role in most countries. The major considerations include: control over the work, hiring, discipline, training, evaluation, etc. Control can either cover the process of performing the work, and/or the result of the work, as well as when and where the work is performed. In some countries, control over the work and the employer's power to direct and supervise are, at least to a certain extent, acknowledged by the relevant statutory provisions. The assignment of such powers to the employer suffices for the definition of an employment relationship in many countries. As a consequence, the actual exertion of such power is not relevant.

(a) Control over the work

Slovenia – Employment Relationship Act, 1 January 2003 Section 4(1) – Definition of employment relationship:

An employment relationship is a relationship between the worker and the employer, whereby the worker is voluntarily included in the employer's organised working process, in which the worker, in return for remuneration, continuously carries out work in person according to the instructions and under the control of the employer.

Luxemburg – Control over the work and work instructions are considered to be elements of subordination. In particular, the right to decide on the place, time, and conditions of work as part of the employer's right to give orders has been considered fundamental for classifying a relationship as subordinate, and thus as an employment relationship. Key indicators of an employment relationship include acts of authority; the employer's right to give orders; the fact that the employer gives orders; the fact that the employee has been given and has to respect detailed instructions and guidelines by the employer; the fact that detailed instructions and deadlines for the work to be performed are provided; and the fact that the employee is assigned a precise task.

Romania – The obligation of the employee is considered to be an obligation of means, as compared to the obligation of a service provider, which is regarded as an obligation of results. Consequently, the right of control exercised by the employer represents an essential criterion in the identification of an employment relationship. Article 40(1) lit. d) of the Labour Code explicitly stipulates: "The employer has the right to exercise control over the manner in which the work is performed". This applies even

in the case of home-workers, in relation to whom Article 108(3) of the Labour Code provides that the employer has the right to monitor their activity, subject to the conditions established by the employment contract.

Malta – Article 2 of the Employment and Industrial Relations Act 2002:

“Employee” means any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person (...).

(b) Work Instructions

“Functional” and “personal instructions”

The requirement of organisational subordination regularly distinguishes between what can be referred to as “personal instructions” and “functional instructions”. Personal instructions aim to determine where and when the work is to be performed and to possibly even regulate the employee’s behaviour at the workplace. The primary aim of functional instructions is to further substantiate the content of the work duties and to instruct the worker on how the work is to be performed. The power of the employer to issue both personal and functional instructions, and to do so continuously, is often a key element in determining the existence of an employment relationship. Some countries acknowledge the relevance of personal instructions (at least to some extent) under statutory provisions.

Bulgaria – Work instructions are among the main elements of subordination of the employee. According to Article 127 (1) item 5 of the Labour Code, the employer is obliged to provide the employee with instructions with regard to the execution of his or her duties and the exercise of his or her rights.

Germany – Federal Labour Court 30.10.1991 – 7 ABR 19/91: “Being integrated in another person’s organisation and existence of a power to direct result in a worker being in a position of subordination. The power to direct may cover content, organisation, time, duration, and place of the activity.”

Spain – Being under the employer’s control and direction has a strong impact on the determination of an employment relationship. This is attributable to the fact that employers enjoy far-reaching supervisory and control powers over their employees and are empowered to give detailed instructions which employees must follow in accordance with their duty of obedience.

Power may not necessarily be used by the employer

In many countries the mere existence of legal power to direct is regarded as sufficient to determine the relationship type, irrespective of whether or not this power is actually used by the employer.⁷

For instance, in **the Netherlands**, the mere existence of the legal power to direct is regarded as sufficient to determine the relationship type, irrespective of whether this power is actually used by the employer. Dutch Supreme Court (Hoge Raad) 17 June 1994, NJ 1994, 757, JAR 1994/152

⁷ See also International Labour Conference, 95th Session, 2006, Report V(1) – “The Employment Relationship”, p. 39.

(Imam): The Supreme Court accepted that an “authority relationship” existed between a mosque's governing body and an imam, because the working hours and possible holidays were determined by the employer. The Supreme Court ruled that the fact that the individual, who had committed himself under an agreement to assume a religious office, was not subject to the employer’s instructions with regard to certain aspects of his work, did not rule out that “with regard to other aspects of the contractual relationship, an authority relationship existed”.

Luxemburg – Some court decisions require the existence of effective and permanent control by the employer, while other decisions have stated that the employer’s control does not necessarily have to be effective and continuous. The fact that the employer is not present most of the time and does not systemically give orders, and that the employee has some freedom to organise his or her work or that no regular controls take place, does not imply that there is no subordination. Subordination does not require the existence of rigid or fixed criteria, but rather depends on the type of work.

Portugal – The mere possibility to control the employee is important, irrespective of whether or not this power is actually exercised by the employer. In other words, legal subordination need only be potential, and not effective, for an employment relationship to exist.

Extent of power to direct

The power to direct may be limited according to the content of the work to be performed. Particularly with regard to highly-skilled individuals, functional instructions – how to perform a given job – may not be a reliable or practical indicator.

Germany – Federal Labour Court of 30. 10. 1991 – 7 ABR 19/91: “Being subjected to instructions is not always typical in professional services of a higher level. The type of activity may imply that the worker enjoys a high degree of freedom, initiative, and professional autonomy.”

United Kingdom – A classic test for the existence of an employment relationship involves an assessment of the extent to which the person engaging the worker exercises, or has the right to exercise, control over the worker (see *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497, MacKenna J at p.515; *Nethermere (St.Neots) Ltd v. Gardiner* [1984] ICR 612, Stephenson LJ, p.623). The changing nature of control in many employment relationships, from ‘how to’ to ‘what to’ (see Viscount Simmonds in *Mersey Docks & Harbour Board v. Coggins & Griffiths Ltd* [1947] AC 1, 12), has blurred the distinction between the extent of control exercised in employment and self-employment relationships, and thus diminished the role of the control test in distinguishing between the two. However, it still plays an important role, and in the 1995 Court of Appeal case of *Lane v. Shire Roofing* ([1995] IRLR 493, Henry LJ indicated (at 495) that the existence of an employment relationship is determined by the answers to the following questions: ‘who lays down what is to be done, the way in which it is to be done, the means by which it is to be done and the time when it is done?’

Ireland – The relevant “Code of Practice for Determining Employment or Self-Employment Status of Individuals” explicitly states an “additional

factor to be considered” is that an employee with specialised knowledge may or may not be directed as to how the work is to be carried out.

3. Integration of the worker in the enterprise

In addition to the employer’s power to direct and control the employee, the integration of the employee in the employer’s organisation is relevant in many countries. While closely connected to the element of control, the integration test shifts the focus from ‘subordination’ to an assessment of the extent to which the worker is incorporated into the beneficiary’s enterprise or undertaking. This assessment may include a consideration of the importance of the worker’s work to the business of the beneficiary, and whether the worker is subject to the same organisational rules, procedures, working arrangements and/or benefit schemes as employees of the beneficiary. However, this test may be less useful in situations where the boundaries of the organisation are diffuse or unclear. Some countries acknowledge the significance of integration in statutory provisions, while the integration of the employee in other countries is of limited relevance, and constitutes only a subsidiary criterion in judicial tests.

Portugal – Integration plays a role in determining the existence of an employment relationship in Portugal. Article 11 of the Labour Code, as amended in 2009, defines an employment contract as being where “a natural person agrees to work for another person, or persons, as part of their organisation and under their direction and control, in exchange payment”.

United Kingdom – While the integration test has been recognised as a test for the existence of an employment relationship (see Denning LJ in *Stevenson, Jordan & Harrison Ltd v. Macdonald & Evans* ([1952] 1 TLR 101, at 111), it has been criticised as unduly vague (see McKenna J in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1967] 2 QB 497, at 524). Its use has been considered particularly problematic in situations of subcontracting or temporary agency labour, where the organisational boundaries are often blurred. However, the potential relevance of integration to determining the existence of an employment relationship was acknowledged by the Court of Appeal in the case of *Tilson v. Alstom Transport* [2010] EWCA Civ 1308 (at 44), in which Elias LJ noted that “[t]he degree of integration may arguably be material to the issue whether, if there is a contract, it is a contract of service”.

4. Work performed solely or primarily for another’s benefit

A key principle for determining the employment status of a contractual relationship is whether the worker is limited exclusively, or at least primarily, to providing services for the benefit of another. This criterion is principally aimed at establishing the economic reality of the relationship and is used in most European countries, although to varying degrees.

Ireland – The decision of *Henry Denny & Sons Ltd., trading as Kerry Foods v. The Minister for Social Welfare* ([1998], 1 IR 34) highlighted the importance of whether the worker performs solely or primarily for another’s benefit to the determination of an employment relationship. In this case, the Irish Supreme Court held that “in general a person will be regarded as providing his or her services under a contract of service and not as an independent

contractor where he or she is performing those services for another person and not for himself or herself” (see judgment of Keane J).

Liechtenstein – The performance of work solely or primarily for the benefit of another is a primary criterion of employment in Liechtenstein. Specifically, section 1173a Article 5(2) of the Civil Code provides that the employee shall immediately remit to the employer anything he or she has produced in the course of his or her contractual activity. Inventions and designs belong to the employer if the employee creates them or participates in their creation while performing his or her employment activity and contractual duties (Para. 1173a Article 41(1) of the Civil Code).

Sweden – When determining whether a worker is an employee or self-employed worker, the courts consider whether the worker is prevented from performing similar work of any significance for someone else under the terms of the contract.

Germany – In its decision of 13.03.2008 – 2 AZR 1037/06, the Federal Labour Court found that a contractual clause that explicitly permits competition between the contracting parties is atypical, and indicative of self-employment.

5. Carried out personally by the worker

Whether the worker is required to carry out the work personally may be an important criterion among those used to determine whether or not an employment contract exists. If the worker can substitute another person to perform the work, the worker is usually not an employee. However, the sub-delegation of some of the work should not be taken as conclusive of independent contractor status. While the right to delegate work may be indicative of self-employment, its existence should be weighed against the growing practice of hiring workers under global or umbrella agreements that often contain the right to reject specific assignments (so-called regular or permanent casual workers, and the increasing use of delegation or substitution clauses in employment contracts. In some countries, a worker’s option to nominate a replacement worker in certain circumstances does not necessarily stand in the way of finding that an employment relationship exists, if such power is acknowledged by the relevant legislation.

Bulgaria – Article 8(4) of the Labour Code states that “labour rights and duties shall be personal. Any renunciation of labour rights, as well as any transfer of labour rights and duties, shall be void.”

Germany – Delegation of work, although possible in principle, is atypical in employment relationships, and therefore indicative of self-employment: see Federal Labour Court decision of 13.03.2008 – 2 AZR 1037/06. Further, a contract for work that cannot be performed without the involvement of third parties indicates self-employment: see Federal Labour Court of 12.12.2001 – 5 AZR 253/00.

Italy – Article 2094 Civil Code states that a subordinate worker is someone who undertakes to collaborate with the enterprise by supplying his or her own intellectual or manual labour, under the direction of the employer and in return for remuneration.

Netherlands – According to Article 7:659 of the Civil Code, work must be performed by the individual employee (Supreme Court Case HR 13 December 1957, NJ 1958, 35 – Zwarthoofd/Het Parool). However, it is possible for the employee to be replaced by another employee, provided that the employer agrees (Supreme Court Cases HR 21 March 1969, NJ 1969, 321; HR 17 November 1978, NJ 1979, 140 – IVA/Queijssen).

Luxemburg – Although employees are not allowed to delegate their work to another person, or assistance in the execution of his or her tasks, a contractual clause permitting an employee to subcontract his or her will not render an employment contract one of self-employment. Rather, such a clause will be invalid where other criteria demonstrate that an employment relationship exists (see CSJ, IIle, 6 November 2003, No. 26971; and CSJ III, 24 May 2007, No. 31536).

Iceland – If a worker engages subcontractors who work directly for him or her in the performance of work under the contract, he or she is considered to be self-employed. Moreover, if the worker is contractually obliged to provide a replacement in case of illness or other similar reasons, he or she is deemed to be self-employed.

Romania – Delegation of work by an employee who is legally prevented from delegating his or her job duties will not be grounds for refuting the existence of an employment contract, but rather only a finding that the employee was in breach.

In the **United Kingdom**, employers have been increasingly using “substitution clauses”. Under such clauses it is stipulated that the worker is not required to personally provide the service, but can delegate his or her work to a substitute worker. In *Express and Echo Publications Ltd. v. Tanton* Court of Appeal [1999] IRLR 367, the Court of Appeal held that the power to delegate work, at any time and for any reason, meant that the contract could not be a contract of employment. This decision was based on the principal that an obligation to provide services personally was an ‘irreducible minimum’ of a contract of employment. However, in *MacFarlane v Glasgow City Council* [2001] IRLR 7, a more limited power of substitution, exercisable only in situations where the worker was unable to work, was found not to prevent the existence of an employment relationship.

6. Carried out within specific hours or at an agreed place

A central aspect of “control” in the work relationship is the right to determine when and where the work is carried out. In general, whether work is being carried out during specific hours or at an agreed time seems to be of diminishing relevance to determining that the work relationship is one of employment. This may be attributable to two facts. First, the power to issue personal instructions regarding working time is restricted in many countries to varying degrees: see Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time and establishing certain minimum requirements. Secondly, the rise of new working time models and communication technology has reduced the extent to which employers seek or exercise control over the time and place of work.

In **Germany**, section 84 of the Commercial Code provides that an individual is self-employed if he or she can arrange his or her professional activities at his or her own discretion and decide on his or her own when to perform the work. This provision represents the basis for defining an “employee” (on the basis of a reverse conclusion) as an individual who is not free to arrange his or her professional activities at his or her own discretion and is not allowed to decide when he or she will perform the work is not assumed to be self-employed.

Slovakia – Labour Code, 2002, Section 43(1) Employment Contract:

In an employment contract, the employer shall be obliged to stipulate with the employee the following substantial items: a) type of work for which the employee has been engaged (description of work activities), b) place of work performance (municipality and organisational unit, or place otherwise determined), c) day of work take-up, d) wage conditions, unless agreed in collective agreement (...).

Luxemburg – Freedom to choose the location and time of work is indicative of self-employment, as subordination is essentially defined as the employer’s right to have the employee at his or her disposal and to give precise instructions: see CSJ 6.11.2003, No. 26971.

7. Having a particular duration and continuity

In the context of increasing casualisation, the Recommendation includes continuity as an indicator for the existence of an employment relationship. However, in most European countries, a particular duration and continuity of contract are not included as indicators for an employment relationship.

Belgium has specific legislation on agency work. Agency work is primarily performed on the basis of temporary contracts for a definite period through a temporary work agency, which is considered by law to be the worker’s employer (Act of 24 July 1987). In principle, temporary agency work is only permissible in three situations: as a replacement for a permanent worker; in cases of temporary and exceptional peaks of work; and in cases of unusual work. If temporary agency work does not meet any of these requirements, the existing relationship will be reclassified as a direct employment contract between the user undertaking and the temporary agency worker, with the contract between the temporary agency worker and the temporary work agency becoming ineffective (substitution of employer). The temporary work agency, however, remains jointly and severally liable for all payments due by the new employer, the user enterprise (Article 31).

Bulgaria – Article 114 of the Labour Code stipulates that “an employment contract can also be concluded for a job during specific days of the month”.

Romania – The law initially stipulated that, for an employment contract to exist, daily work had to exceed two hours. However, this provision was amended in 2006, allowing employment contracts to be concluded for any number of daily working hours.

Finland – Duration and continuity are not distinguishing criteria as such. In a case brought before the Finnish Supreme Court (Supreme Court 1995:159), on-call workers were considered to have several short-term employment relationships. The fact that the periods of work consisted of a

couple of hours on a given day did not rule out the possibility that this short work period constituted an employment relationship. The employees claimed that the employment relationship was ongoing, despite the fact that it comprised intermittent working and non-working periods. In terms of continuity, legislation explicitly acknowledges that several employment contracts may exist, even where the work is intermittent.

Norway – Temporary workers may be employed on temporary contracts for a period of up to four years. If the employment periods (consecutive contracts) last for more than four years, the contract is deemed to be a permanent contract of employment.

Netherlands – If a person has worked for another person every week over a period of three consecutive months, or for at least 20 hours per month, a contract of employment is presumed to exist between the parties (Art. 7:610a of the Civil Code). The presumed employer may, however, prove that the relationship is not a contract of employment.

In **Luxemburg**, Art. L. 131-8 (3) of the Labour Code provides that a temporary agency work contract which exceeds the legal maximum duration of 12 months will be deemed an open-ended contract with the temporary work agency (not with the user undertaking).

In the **UK**, a “commercial” relationship of a self-employed person providing services exclusively for an enterprise over an extended period of time will not be reclassified as being an employment relationship. Rather, the courts will seek to determine whether the commercial relationship is being used as a sham and a genuine employment relationship exists (see *Protectacoat Firthglow LTD v Silagy* [2009] IRLR 365).

8. Requires worker’s availability

A requirement that a worker be available to the employer may be indicative of the employment status, even in the absence of the actual performance of work itself. However, availability is most relevant to circumstances in which a worker is required to be ‘on call’ or ‘on stand-by’ for the performance of work. As such, it is of minor importance as an indicator of the employment relationship.

Slovakia – Labour Code, 2002:

Article 96(1): Work on stand-by refers to an employer who, in justified cases and in order to secure the completion of necessary tasks, requests an employee or agrees with him/her to be on call for a specified time at a specified place and to be prepared to perform work outside the scope of the timetable of work shifts and beyond the determined weekly working time arising from the predetermined working time distribution.

Article 96(7): “An employer may request an employee to be on-call up to a maximum of 8 hours per week and 100 hours per calendar year. On-call work exceeding this scope shall only be admissible upon agreement with the employee.”

9. Provision of tools/materials by the individual requesting the performance of work

The ownership of tools and equipment should not be accorded decisive weight in determining the status of a worker, as many employees own their

own tools. The significance of this criterion is therefore fairly limited in most European countries, and expressly excluded as being a determinative factor in others. However, a substantial capital investment by the worker, such as the purchase of a vehicle, may support a finding that the worker is an independent contractor.

Ireland – Using one's own tools and materials serves as a criterion to indicate that a person is self-employed. Where the tools of the trade or equipment are of minor importance, however, this would not be indicative that a person owns an independent business.

Finland – Employment Contracts Act, No. 55 of 2001, section 1 – Scope of application: "Application of the Act is not prevented merely by the fact that the work is performed at the employee's home or at a place chosen by the employee, or by the fact that the work is performed using the employee's implements or machinery".

Liechtenstein – The provision of tools is among the indicators of employment status established by statute. However, while an employer is usually expected to equip an employee with the tools and materials required to perform the employee's work, this practice may be overturned by agreement or customary practice (Section 1173a Article 23(1) of the Liechtenstein Civil Code).

Spain – In the case of drivers, ownership of the transport vehicle is relevant to distinguishing between the existence of an employment contract and commercial contract of carriage. The likelihood that the driver will be considered an independent contractor increases with the size – and thus cost – of the vehicle the driver owns.

R 198 Paragraph 13:

Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include: (...)

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and

10. Periodic payments to the worker

The receipt of regular, periodic payments from a principal, rather than payment upon the submission of invoices or the completion of specified services, is widely used as an indicator of employment.

Luxemburg – Regular payment may be considered evidence of a worker's status as an employee. The regularity of the payment may either refer to the timing (periodical payment) or the amount (fixed salary) of the payment. However, the timing, amount and basis of payment is a problematic indicator of employment status, as the law allows for employed persons being paid on the basis of piecework, commission or percentage. Non-employed workers can also be paid a regular or fixed fee. Moreover, the legal requirements concerning the payment of employees mean that reliance on it as an indicator of employment may pervert the protective intent of the law, prompting courts to find against an employment relationship if the payments are too low, too irregular or not made at all. Thus, periodic payments do not allow for an unambiguous conclusion on the worker's status.

Austria – Section 1152 of the Civil Code explicitly acknowledges that unpaid work is possible within an employment relationship. However, where the parties to an employment relationship do not expressly agree on remuneration, the contract is not presumed to be unpaid, but rather taken to include an implied obligation to pay adequate remuneration for work performed.

*annual holidays;
payment by the party
requesting the work
for travel undertaken
by the worker in order
to carry out the work;
or absence of
financial risk for the
worker.*

Germany – According to the Federal Labour Court (see decision of 16.03.1994 – 5 AZR 447/92), the modalities of remuneration (as opposed to the modalities of work performance) do not play an important role in determining the existence of an employment relationship. The same applies to other “formal” features like payment of taxes and social security contributions. According to the Federal Labour Court (29.08.2012 – 10 AZR 499/11) a person who worked in an honorary capacity at a local crisis helpline is not an employee. The Court made it clear that the exercise of an honorary post is not intended to safeguard or improve the economic livelihood of the person concerned. Instead, it is an expression of an inner attitude towards matters of public interest and the concerns and needs of others. Accordingly, it could not lead to an employment relationship being established.

Italy – Case law provides that periodic payment indicates that an employment relationship exists.

11. This remuneration being the sole or principal source of income

If an “independent contractor” is legally entitled to sell his or her services to the world at large, but in practice works entirely or substantially for one employer, this suggests that the individual is actually an employee. The fact that a person works for more than one employer, on the other hand, does not necessarily indicate that he or she is an independent contractor rather than an employee.

In most countries, economic considerations play a role in determining whether an individual is to be regarded as an employee. Mere “economic dependence” is not singularly decisive, as the existence of “economic” dependence cannot substitute a lack of “organisational dependence”. However, at least in some European countries, economic dependence may compensate for a lack of certain elements of “organisational dependence”.

Germany – Federal Labour Court 20. 09.2000 – 5 AZR 61/99: “A definition of the term “employee” must primarily be derived on the basis of arguing *e contrario* from the statutory provisions regarding independent service providers, on the one hand, and “employee-like persons”, on the other. It follows from this legislation that “economic dependence” is neither regarded as required nor by itself sufficient when determining employee status.”

Austria – Economic dependence is often used to justify the application of protective labour law provisions. On the one hand, economic dependence may be characterised, by a worker’s dependence on the employer’s resources, failure to incorporate, and limited contracting partners. On the other hand, economic dependence may be characterised as dependence on a salary to earn a living. However, economic dependence alone may only give rise to employee-like status and will not substitute the organisational dependence required for a finding of employment.

12. Payment in kind

Bulgaria – According to Article 269 of the Labour Code, “the labour remuneration shall be paid in cash. Additional labour remunerations or part

thereof may be paid in kind if so provided in an Act of the Council of Ministers, in a collective agreement or in the employment contract.”

Italy – Civil Code Article 2099:

The remuneration of workers can be established on the basis of time or performance and it shall be paid according to the modalities and within the terms in use at the place where the work is carried out. In the absence of an agreement between the parties, the remuneration shall be determined by the judges taking into consideration, if applicable, the opinion of professional organizations. The worker may be remunerated in whole or in part with participation in the results or in kind.

Romania – In the case of an employment contract, wages may be partially paid in kind, provided the part paid in cash is not lower than the minimum national wage. However, the classification of the contract would be affected by the payment of the entire wage in kind. Instead, the employer would be regarded as having failed to fulfil his legal obligations.

Spain – Payment in kind is admissible if it does not exceed 30 per cent of the total salary owed.

13. Recognition of entitlements

Where a contract provides for entitlements that are typical to an employment relationship, such as weekly rest periods or annual leave, the contract is considered to be a contract of employment. A worker’s entitlement to certain allowances (for example, Christmas or holiday allowances) is expressly included among the factors indicating employment in some countries. In general, the presence of references to labour law in a contract points strongly to the existence of an employment relationship.

Iceland – Recognition of entitlements, such as employee rights and benefits, are a fundamental factor and support the assumption of the existence of an employment relationship. Similarly, the existence of the right to notice of termination indicates that the worker is an employee.

Ireland – Whether a person is entitled to extra pay or time in lieu is of some importance. An individual is generally considered an employee if he or she receives expense payments to cover subsistence and/or travel expenses, and/or is entitled to extra pay or time off for overtime.

Luxemburg – The fact that a worker is granted annual leave, public holiday payments, or similar entitlements, strongly suggests that the contract is an employment contract. Factors which have been considered indications of employee status include earning a “thirteenth pay” (CSJ, IIIe, 9.2.2006, No. 28060), or benefitting from a “family bonus” and being paid sick leave (CSJ, IIIe, 27.2.2003, No. 26541). However, court decisions frequently do not refer to these entitlements. Also, one court decision found that benefitting from a complementary pension scheme should not be considered a decisive element of an employment contract (CSJ, VIIIe, 22.1.2004, No. 27451).

14. Travel payment by the person requesting the performance of work

Where a contract provides for a worker to be reimbursed for travel expenses, it is likely that he or she is an employee.

Liechtenstein – The travel expenses necessary for the performance of work must be borne by the employer. The employer shall reimburse the employee for all expenses which necessarily arise from the performance of the work (Section 1173a Art. 24(1) of the Civil Code).

Luxemburg – The courts do not usually refer to travel expenses as a criterion in determining employment status. However, the general question of who has to pay the costs and charges linked to the execution of work is a factor that courts occasionally use. Some courts consider it an insufficient factor (CSJ, 29.1.2004, No. 22342; CSJ, VIIIe, 14.6.2007, No. 31341), whereas other courts have taken it into consideration to determine subordination (CSJ, 20.10, 1994; CSJ, IIIe, 27.2.2003, No. 26541; CAAS, 18.10.2004).

15. Absence of financial risk for the worker

Another feature of being integrated in the workforce is that the individual does not bear direct financial consequences if the employer's business becomes less profitable. Conversely, they also do not necessarily enjoy benefits if the business is successful. A worker's exposure to chance of profit and risk of loss may be a strong indicator of his or her employee status. However, incentive structures such as commissions or bonus pay should not be considered indicative of financial risk. Instead, the question is whether the worker's gains or losses are dependent on something other than his or her own work efforts. It is acknowledged in most countries that the absence of financial risks may indicate the existence of an employment relationship and that the existence of financial risks may indicate self-employment.

Italy – Absence of financial risk is a primary criterion for determining the employment relationship. The Italian Supreme Court has indicated that, in order "to exclude the subordination in the employment relationship performed on an ongoing continuous basis with another subject, it is necessary for the Court to ascertain the financial risk for the worker; for example, that the purchase or use of materials required to carry out the work remains the responsibility of the respective worker, or that the relationship with third users is created and managed by the respective worker"; see Cassazione civile, sez. lav, 8 August 2008, No. 21380.

A factor relevant to this test is the value of a worker's investment in his/her business, such that the greater the investment value, the greater the likelihood that the worker is conducting a separate business and is therefore an independent contractor. There is no particular scale or formula for measuring or comparing the significance of a worker's investment. However, courts have suggested that comparing the investment/risk level with the value of the work, i.e., investments in physical assets related to intellectual/human capital, may be useful.

Finland – The absence of financial risks is among the criteria identified in the legislation. The employee is to not bear any economic risks from the performance of work, with the exception of leaving damages and tort liabilities.

Luxemburg – The employer must bear all entrepreneurial risks (Art. L. 121-9. C.T). Where a worker is required to bear entrepreneurial risk without the power to prevent risk from occurring due to a lack of budgetary and organisational freedom, he or she will be considered an employee. However, very few court decisions have referred to the burden of financial risk (see, for example, CAAS, 18.10.2004).

Poland – All types of risk lie with the employer: technical risk (e.g. an obligation to pay remuneration for the time when work cannot be carried out due to technical reasons), personal risk (e.g. employer responsibility for employees' actions), economic risk (e.g. the employer's losses should not affect an employee's right to receive remuneration), and social risk (e.g. some benefits for an employee in case of illness or absence from work due to personal reasons). Placing a risk on the working person would, in principle, not qualify such a person as an employee.

Austria – Although the absence of financial risks is an important indicator of whether the worker is an employee, the presence of financial risks (of any kind) never prevents a person from being qualified as an "employee", if "personal subordination" exists. However, the transfer of risk to the employer to the employee may be in conflict with "good manners" (Section 879 of the Civil Code) and could therefore be ruled void by the labour court.

Ireland – One of the criteria set out in the Code of Practice states that an employee is not exposed to personal financial risk when carrying out his or her work. In addition, the Code of Practice provides that an employee does not have responsibility for investments in or management of the business, or the possibility to profit from sound management of the business.

In **Norway**, too, the bearing or non-bearing of risks is among the indicators that are taken into account by the courts when conducting an overall assessment of the facts (Supreme Court Cases HR-1994-83-A and HR-2001-151).

16. Mutuality of obligations

Several courts use a "mutuality of obligations" as an additional criterion when assessing an employment relationship. This is a complex concept, but in essence implies that the employee is obliged to accept the work offered to him and her and the employer is, at least to a certain extent, obliged to provide work to the employee. In many countries, an obligation to provide work is legally acknowledged only to the extent that providing actual work is key to maintaining the employee's qualifications.

United Kingdom – The *mutuality of obligation* test looks for the co-existence of an obligation on the employer to provide work to the worker, and an obligation on the worker to perform work, for the purposes of determining whether an employment relationship exists. This test has proved particularly pertinent to cases involving "atypical workers", such as home-workers (*Nethermere (St.Neots) Ltd v. Taverna and Gardiner* [1984]

IRLR 240), agency workers (*Wickens v. Champion Employment Agency* [1984] ICR 365), zero-hours contract workers (*Clark v. Oxfordshire Health Authority* [1998] IRLR 125), and casual workers. In 1988, an English Court of Appeal judge commented that a person “is without question free under the law of contract to carry out certain work for another without entering into a contract of service. Public policy has nothing to say either way” (Ralph Gibson LJ in *Calder v. H. Kitson Vickers & Sons (Engineers) Ltd.* [1988] ICR 232, 251). This position reflects the traditional view of labour legislation in the UK as being superimposed on the contractual relationship of the parties and, as such, to be construed as narrowly as possible, so as not to infringe on their common law right of freedom of contract.

In **Spain** under an employment contract the employer is obliged to provide “effective occupation”. If the company does not employ the worker, it breaches the contract and may even found guilty of “harassing” the worker.

17. Other criteria

The tax law perspective is taken into account when determining employment status in some countries, whereas the position under social security law is taken into consideration in others. Such other various criteria and indicators are relevant, but of minor importance, to determining the existence of an employment relationship.

In **Romania**, formal requirements, such as the obligation to be included in a specific register (e.g. business register), play an important role.

Denmark – Taxation of the work in question is an important criterion in determining whether an individual is to be considered an employee. This is partly attributable to the fact that the definition of the term “employee” in labour law and tax law is almost congruent. Therefore, the worker’s position as employed or self-employed may be indicated by whether taxation is carried out on an employment basis or self-employed basis.

Iceland – A workers’ association with a labour union indicates that the worker is an employee, and a worker’s association with an employers’ union suggests that he or she is self-employed.

Luxemburg – The courts sometimes refer to criteria such as whether the company’s name includes the worker’s name or initials (CSJ, VIIIe, 10.7.2008, No. 32804), whether the worker has to wear a uniform or specific dress (CSJ, VIIIe, 27.11.2008, No. 32887), and the worker is listed on the payroll (CSJ, IIIe, 9.2.2006, No. 28060).

Sweden – In the absence of a statutory definition of the term ‘employee’, the courts have developed a multi-factor test for employment. The test focuses on the individual person in question, and on whether the overall situation of this particular person is similar to that of an ordinary employee or an ordinary self-employed worker. In this multi-factor test, the courts also take a ‘social criterion’ into consideration, namely whether the economic and social situation of the worker is equal to that of an ordinary employee. With the courts explicitly taking the person’s economic and social situation into consideration, a worker’s dependence and insecure position can grant him/ her employee status.

Finland – Additional questions that may be asked by the courts include: Does the employer withhold taxes from the employee's salary? Is insurance provided for the employee by the employer? Does the employer pay the employee's pension fees?

III. Adopting measures with a view to ensuring compliance

R 198 Paragraph 14:
The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.

The Recommendation proposes the competent authority to adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship, for example, through dispute settlement procedures, labour inspection services, and their collaboration with the social security administration and tax authorities.

1. Appropriate dispute resolution mechanisms: Inexpensive, speedy, fair, and efficient procedures

The problem of non-compliance requires the establishment of efficient labour dispute settlement and enforcement procedures. According to the European Commission's Green Paper on modernising labour law to meet the challenges of the 21st century, "[e]nforcement mechanisms should be sufficient to ensure well-functioning and adaptable labour markets, to prevent infringements of labour law at national level and to safeguard workers' rights in the emerging European labour market".⁸ ILO research reveals that mechanisms and procedures for determining the existence of an employment relationship and establishing the identity of the persons involved are generally insufficient to prevent infringements of labour law or to safeguard workers' rights. Problems of compliance and enforcement are particularly acute in the informal economy.

In many European countries, dispute resolution mechanisms exist comprising principally of mediation and conciliation procedures. Arbitration is less common, because there is concern in many countries that employees could be harmed if subjected to private arbitration instead of state court procedures. For example, arbitration is not permissible as a tool for settling individual labour disputes in **Greece** (Article 867 of the Greek Civil Procedure Code) and the ILO Governance and Tripartism Department has a full programme of services for establishing, training, upgrading, and modernising these mechanisms, be they administrative or adjudicatory. In **Bulgaria** (Article 19(2) of the Code on Civil Procedure). A similar restriction applies in **Germany** (see Sections 4, 101 ff. of the Act on Labour Courts).

Ireland – Disputes arising under labour law can be referred to a Rights Commissioner. Where both parties agree, disputes may be submitted to the Labour Relations Commission, whose industrial relations officers will attempt to reach a conciliated outcome. If this cannot be achieved, the dispute can be referred to the labour court for a non-binding adjudication. However, in order to facilitate compliance with employment rights across

⁸ European Commission Green Paper, "Modernising labour law to meet the challenges of the 21st century", COM (2006) 708, p. 14.

the economy, the Irish Government established the National Employment Rights Authority in February 2007. Its inspectors have been granted extensive powers to promote, encourage, and secure compliance. While the power to conclusively determine whether an employment relationship exists remains the exclusive province of the labour courts, the National Employment Rights Authority Inspectors are to express their opinion on the existence of an employment relationship before exercising their powers. Such a statement of opinion is expected to assist in the efficient resolution of disputes over the proper characterisation of work relationships and thus the rights and obligations arising under a contract for work.

Greece – The Labour Inspectorate can assume a mediating role in the case of a dispute worker and principal, including disputes concerning the existence of an employment relationship between the parties. The mediation procedure adopted by the Inspectorate is informal and no specific rules have been established. The employee may request mediation of the Inspectorate which is required to call on the employer to try to settle the dispute.

Belgium – Each sector of private industry has a Joint Sectoral Committee that can resolve individual labour disputes where the parties to the dispute accept the competence of the Committee. In theory, disputes regarding the existence of an employment relationship may be referred to these Committees, although such references have to date been rare. Where a Joint Sectoral Committee is asked to determine the existence of an employment relationship, no specific procedure applies to the dispute resolution process, unless one is provided for in an applicable collective labour agreement. The Joint Sectoral Committees are an important channel for the settlement of disputes. In the future, an Administrative Commission will be empowered to make an assessment of the legal relationship. However, the ruling of an Administrative Commission will only be binding on social security institutions and not on the parties to the employment relationship. In the case of a dispute between the parties, the power to make a final decision rests with the labour courts, under the supervision of the Belgian Cour de cassation (Article 338 Labour Relations Act of 27 December 2006; 2 Royal decrees of 14 December 2010).

Denmark – The Labour Court and Industrial Arbitration Act of 2008 requires parties to a dispute involving a collective agreement to participate in a dispute conciliation meeting. This is also provided for by the terms of collective agreements themselves. A key feature of dispute conciliation meeting is that it is to be carried out by a joint committee, comprising of representatives from both the employer and employee organisations that are party to the collective agreement. The joint committee is empowered to decide whether an individual is performing his or her work as an employee or as a self-employed person. Although this power does not replace the jurisdiction of the Labour Court or Industrial Arbitration Court to determine the worker's employment status, in practice, however, only a very small group of cases have examined the distinction between an employee and a self-employed person. As both the employer and the employee must comply with the decision made by the joint committee, the dispute may only be referred to the Labour Court or Industrial Arbitration Court if the organisations fail to settle the dispute during the conciliation process.

R 198 Paragraph 15:

The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities.

2. The role of labour inspection

With reference to the global situation, the Annotated Guide to ILO Recommendation No. 198 stated:

Currently in a number of Industrialized Market Economy Countries (IMEC), (...) the powers and responsibilities of inspectors are not clearly defined, are insufficient for the tasks at hand and, in certain respects, are encumbered by inappropriate procedural arrangements. These problems lead to a dissipation of inspectors' time and energies, resulting in their inability to pursue questionable cases that might, in some circumstances, reveal larger problems that ought to be addressed by new regulations or statutory amendments.

It was therefore suggested that "instead of concentrating on processing workers' complaints, it would be more effective for inspectors to take the initiative by randomly auditing sectors or enterprises that exhibit a profile of non-compliance, or by making a concerted effort to enforce particular provisions of the Labour Code that seem to be violated with unusual frequency".

With regard to the situation in Europe, labour inspectorates in many countries enjoy far-reaching powers to investigate the true nature of the employment relationship, either at their own initiative or following a complaint by an individual. In general, labour inspectorates play an important role in determining whether the proper legal regime is being applied in accordance with the correct classification of the given contract, and whether the rights and duties of the employee are being respected.

Belgium – The Labour Inspectorate possesses considerable powers under the Employment and Social Security Criminal Code of 6 June 2010, including the power to make official findings on the status of an [employment] relationship. The official findings of the Labour Inspectorate can have far-reaching consequences, such as the payment of wages in arrear and/or various allowances. Where appropriate, the official findings of the Labour Inspectorate may form the basis of judicial proceedings, administrative penalties and criminal prosecution. In this way, the Labour Inspectorate plays an important role in the fight against bogus self-employment arrangements.

Bulgaria: Pursuant to Article 405a of the Labour Code, which ascertains whether manpower is being provided without the existence of an employment relationship, the existence of such relationship shall be declared by an order issued by the labour inspection authorities. In such a case, the existence of an employment relationship may be ascertained by all means of proof. The order shall determine the commencement date of the establishment of the employment relationship. The relationship between the parties prior to the issuance of the order is regulated as having been under an effective employment contract, if the worker acted in good faith upon the commencement of work.

Finland – The Occupational Safety and Health Administration may decide, in cases falling within its competence, whether a contract is regarded as an employment relationship or not. In addition, the Labour Council may also deal with this question. The Labour Council is a tripartite body, consisting of government, employer and employee representatives, which issues opinions on the application and interpretation of laws on working hours,

annual holidays, the exploitation of children and young people for work, and the protection of other employees and, most relevantly for current purposes, the status of a contract to perform work.

Latvia – Labour inspectorates are empowered to require an employer to conclude an employment contract with a worker, if they ascertain that an employment relationship indeed exists between the relevant parties. The State Labour Inspectorate may also issue administrative acts obliging employers to perform certain tasks and fulfil specific obligations.

Sweden does not have specialised labour inspectorates. Rather, under the ‘Swedish Model’ of industrial relations, responsibility for the enforcement of labour legislation and collective agreements falls to trade unions and some government authorities, such as the Working Environment Authority and the Discrimination Ombudsman.

In some countries, authorities other than labour inspectorates enjoy the power to investigate whether an employment relationship exists. For instance, the Redundant Employees Fund in **Cyprus**, which is charged with providing compensation to redundant employees, investigates whether the redundancy alleged is genuine or not; it is a condition for any redundancy claim that there is an employment relationship or employment contract.

Italy – Labour inspectorates are responsible for controlling the application of labour standards insofar as the standards do not strictly relate to matters of health and safety. Since 2007, labour inspectorates have also provided advice in cases of uncertainty with regard to the application of labour law.

Norway – The Labour Inspection Authority offers guidance on employment issues to all persons concerned. In practice, the Labour Inspection Authority will often settle disputes by simply providing information. In addition, the Labour Inspection Authority has the power to investigate the true nature of an employment relationship. Finally, trade unions may bring a complaint before the labour court, usually as regards the payment of wages which were lower than stipulated by collective agreements.

Portugal – Article 12 No. 2 of the Labour Code provides that the performance of an activity “with the formal appearance of a services agreement but according to conditions typical of an employment contract, in a way that might cause damages to the employee or to the State”, is “a very serious misdemeanour”. If the contract in fact corresponds to an employment agreement, the employee is entitled to all rights that emerge from an employment relationship and a unilateral termination of the agreement by the employer is equivalent to unfair dismissal. In addition, the employer is liable for non-compliance with tax and social security duties.

R 198 Paragraph 16:
*National labour
administrations should
monitor the
enforcement in sectors
with a high proportion
of women.*

3. Enforcement in sectors with a high share of women

Within the European Union, a total of 13 pieces of legislation have been adopted since the 1970s with the aim of ensuring that women and men receive fair and equal treatment at work. These laws cover a range of areas, including equal treatment when applying for a job, equal treatment at work, protection of pregnant workers and breastfeeding mothers, and rights to maternity leave and parental leave. Article 4 of Directive

2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment states:

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

R 198 Paragraph 17:
*Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing **incentives** to disguise an employment relationship.*

4. Disincentives to disguising an employment relationship

Slovenia – The Employment Relationships Act, as amended in 2007, provides that a fine of 3.000 to 20.000 euros may be imposed on an employer or other legal person, such as an individual private entrepreneur or an individual performing an independent business activity, if a worker performs work for him or her on the basis of a civil law contract contrary to paragraph 2 of Article 11 of that Act (at point 2 of Paragraph 1 of Article 229).

France – Since 1997, the category of “concealed labour” has existed in French law. This category encompasses the majority of undeclared labour practices including bogus self-employment. The “concealed labour” category describes two types of action: (1) the “concealment of activity” (when profit-oriented activities are led in such a manner that they intentionally evade taxes or socio-legislative rules); and (2) the “concealment of an employment relationship”, which includes “bogus self-employment”. Concealment of an employment relationship is often used in order to avoid the obligations defined by the Labour Code and to avoid payment of taxes and social insurance contributions. If an apparent self-employed person is in fact in a subordinate relationship with the so-called contractor (i.e. his or her employer), the initiator of the situation can be prosecuted for concealing an employment relationship and the contract must be re-established as an employment contract.

In the **United Kingdom**, Section 23 of the Employment Relations Act 1999 authorises the Government to adjust the scope of the law. This novel power was created to respond to the growing problem of disguised and objectively ambiguous employment relationships. However, the power has never been exercised.

Spain – In 2011, a law was promulgated which fixes a deadline for employers to declare the existence of an employment contract (principally for the purposes of social security entitlements). The law imposes considerable administrative penalties for failing to comply with labour legislation through hidden employment arrangements. If the employer commits fraud, or if his or her actions amount to a grave abuse of employee rights, such a breach may also constitute a crime and may result in imprisonment.

Slovakia – To discourage bogus self-employment arrangements, the definition of “dependent work” was included in the Labour Code by Slovak Act No. 348/2007 Coll. Article 11(1) of the Labour Code provides that “an employee shall be a natural person who in labour law relations and, if

specified by special regulation, in similar labour relations, performs dependent work for the employer". According to Article 1(2) of the Labour Code, "dependent work, which is performed in a relationship in which the employer is the superior and the employee is subordinate, is defined solely as work performed personally, e.g. as an employee for an employer, according to the employer's instructions, in the employer's name, for a wage or commission, during working time, at the expense of the employer, using the employer's tools and with the employer's liability, as well as consisting primarily of certain repeated activities." Moreover, the Labour Code states that dependent work may only be performed in an employment relationship, a similar working relationship or, in exceptional circumstances set out by the Labour Code, another form of labour law relationship. A business activity or another gainful activity that is based on a contractual relationship under civil or commercial law is not deemed to constitute dependent work (Article 2(3) of the Labour Code). A penalty may be imposed by the Labour Inspectorate in cases of non-compliance.

Lithuania – Bogus self-employment is regarded as a form of illegal work. In an effort to address the issue of illegal work arrangements, the Lithuanian Parliament particularised the definition of illegal work in August 2009, specifying that work is illegal if performed without stipulating whether the worker is employed and insured within the scope of an employment contract.

Austria – The Government has passed important legislation during the last ten years to combat false labelling and bogus self-employment in the field of social security law. Administrative and criminal penalties have been introduced or tightened, and task forces have been established to investigate work-sites where bogus self-employment arrangements were known to be prevalent, making control more effective. Further, social insurance schemes have been extended to cover self-employed persons, so that they, like employees, must pay insurance premiums. The Government has also tightened the penalties for false labelling of work relationships under tax law. In addition, tax and social security officials are empowered to assess the true nature of the relationship. Although principally intended determining the application of tax and social security laws such an assessment will affect the classification of the relationship under labour law.

Italy – Article 69 of Legislative Decree No. 276 of 2003 (the so-called "*Riforma Biagi*") introduced a legal presumption of subordination in cases where a project work contract has been concluded without the definition of the relevant project. This presumption is intended to guard against the use of bogus self-employment arrangements.

One of the consequences of bogus self-employment in some countries is a contractor who is found to be an employer must retrospectively pay for all social security contributions and taxes due during the period of false self-employment. In some European countries, an employer who is found to have intentionally falsely labelled a worker's legal status may also face administrative sanctions, such as penalty payments, even where the worker agreed to the false label by concluding a services contract.

Austria – The Supreme Court has ruled that an employee may invoke his or her "true" employment status, even if he or she agreed to false labelling of the work relationship (Supreme Court, OGH 11 October 2007, 8 ObA

49/07z). The court argued that the employer's behaviour violated the principle of *bona fide* or 'good faith'. As a consequence, the employee was able to invoke the true employment status of the work relationship at any time within the limitation period, and the employer was obliged bear the cost of retrospectively paying wages in accordance with the collective agreement and compensating the worker for other entitlements such, as leave, sick pay, etc.

Bulgaria – the labour inspectors are authorised to suspend operations on a work site or even the operation of the entire enterprise, if the employer has repeatedly breached his obligation to put employment contracts in writing.

France – The penalty for bogus self-employment is the same as that for concealed labour. A natural person, when convicted, may face three years' imprisonment and a fine of EUR 45.000. The following penalties may apply to a convicted business: a five year ban on practice; the seizure of tools; machinery, goods in hand and stocks in trade; the publication and announcement of the judgment; a temporary or permanent exclusion from a public authority commission; and/or a fine of EUR 225.000. The following penalties may also be imposed on natural persons, in addition to those listed above: dissolution of the business; a ban on practice; and permanent or temporary closure of the enterprise.

Germany – Intentional false labelling of employees is penalised within the scope of the Criminal Code (see Section 266a (2) of the Penal Code).

Poland – Article 281 item 4 of the Labour Code: "A person, being an employer or acting on his behalf, who enters into a civil law contract in circumstances where, pursuant to Article 22 §1, an employment contract should have been concluded shall be fined."

5. Burden of proof

In the **Netherlands**, far-reaching presumptions in favour of an employment relationship exist. In *Groen/Schoevers* (HR 14 November 1997, NJ 1998, 149, JAR 1997, 263),⁹ the Supreme Court ruled that the legal presumptions can be rebutted. In such cases, it is for the party providing the "employee" with work to assert and prove that it was not the parties' intention to establish an employment relationship. Additionally, that party must prove that the contract was not in fact implemented in such a way that one could assume the existence of an employment relationship.

Portugal – Article 12 of the Labour Code establishes a legal presumption of an employment contract where the party claiming employment establishes that certain elements existed (e.g. work was performed in a place belonging to the beneficiary of the work, and using tools belonging to the beneficiary, etc.). The beneficiary of the work then bears the burden of proving that the legal presumption should not be applied in the circumstances due to other elements of their work relationship.

⁹ See also International Labour Conference, 95th Session, 2006, Report V(1) – "The Employment Relationship", p. 29.

Hungary – Section 1(5) of the Act LXXV of 1996:

On the basis of the facts stated in the course of the official inspection, the inspector is entitled to determine the legal relationship between the employer and the person working for him, or serving as a basis for transferring employees for work performance, as well as the relationship established by virtue of the actual employment. For this, the employer shall provide all the evidence on the basis of which it can be stated that the work was carried out for him by virtue of the legal relationships under (4), or without remuneration.

IV. Implementation and monitoring

R 198 Paragraph 19:
Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

R 198 Paragraph 20:
The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever

To better assess and address the various issues relating to the scope of an employment relationship, governments should collect statistical data and conduct research and periodic reviews of changes in the structure and patterns of work at a national and sectoral level. All data collected should be disaggregated according to sex and the national and sectoral level research, and reviews should explicitly incorporate the gender dimension and take other aspects of diversity into account. Social dialogue is also referred to above in Part 3 of Chapter I (National Policy of the Protection of Workers in an Employment Relationship).

At the European level, the Labour Market Working Group of the Economic Policy Committee¹⁰ monitors labour market issues and reforms in EU Member States, and provides relevant analysis on labour market issues and policy implications. In 2010, the European Commission launched a new project to promote the “New Skills for New Jobs” initiative.¹¹ This project, titled “Monitoring labour market developments in Europe”, aims to collect current information on job vacancies and should reveal disparities on the labour market. The information is made available through the European Vacancy Monitor (EVM) and the European Job Mobility Bulletin (EJMB).

In order to respond to the requirements of economic and monetary policy in the European Union, Eurostat, the statistical office of the European Union, provides the European Union with statistics at European level that enable comparisons between countries and regions. Labour market statistics measure the involvement of individuals, households, and businesses in the labour market. They cover short-term and structural aspects of the labour market, including labour force, job vacancies, earnings structures, the gender pay gap, minimum wages, labour costs, labour market policies and labour disputes.¹²

With specific regard to EU Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Article 4(2) expressly states:

Member States shall make provision for cooperation between the public authorities which, in accordance with national legislation, are responsible for

¹⁰ The Economic Policy Committee (EPC) was set up by a Council decision on 18 February 1974 (74/122/EEC). It contributes to the Council's work of coordinating the economic policies of the Member States and of the Community and provides advice to the Commission and the Council. A revised statute was adopted by the Council on 18 June 2003 (2003/475/EC), see http://europa.eu/epc/about/index_en.htm

¹¹ This initiative is part of the EU's overall strategy “Europe 2020”. It aims, among other things, to reach the EU's employment target for 2020: 75 per cent of the working age population (20-64 years) in work.

¹² See <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home>

possible and useful, on the basis of expert reports or technical studies.

R 198 Paragraph 21:

*Members should, to the extent possible, **collect information and statistical data and undertake research** on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.*

monitoring the terms and conditions of employment referred to in Article 3 [minimum terms and conditions of employment]. Such cooperation shall in particular consist in replying to reasoned requests from those authorities for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities.

Belgium – The National Labour Council, created in 1952, is a permanent tripartite body set up to: advise Ministers or the Houses of Parliament on general social issues concerning employers and workers, either on its own initiative or at the request of these authorities; issue opinions on jurisdictional disputes between joint committees; conclude collective labour agreements which are binding on various branches of activity or all private sectors of the economy; and carry out more specialized advisory tasks with respect to social laws. Such laws include those relating to work contracts, organisation of the economy, collective industrial agreements and joint committees, protection of remuneration, Labour Act (including working hours, Sunday rest, young people's work, women's work and protection of maternity), work rules, paid holidays, labour courts or tribunals, and wage earners' social security and pensions, etc. On 19 December 2006, the National Labour Council gave its “recommendation” on the bill transposing EU Directive 96/71/EC on the posting of workers in the framework of the provision of services into the Belgian legal system.

Annex I.

R198 Employment Relationship Recommendation, 2006

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Ninety-fifth Session on 31 May 2006, and

Considering that there is protection offered by national laws and regulations and collective agreements which are linked to the existence of an employment relationship between an employer and an employee, and

Considering that laws and regulations, and their interpretation, should be compatible with the objectives of decent work, and

Considering that employment or labour law seeks, among other things, to address what can be an unequal bargaining position between parties to an employment relationship, and

Considering that the protection of workers is at the heart of the mandate of the International Labour Organization, and in accordance with principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and the Decent Work Agenda, and

Considering the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and

Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, and

Recognizing that there is a role for international guidance to Members in achieving this protection through national law and practice, and that such guidance should remain relevant over time, and

Further recognizing that such protection should be accessible to all, particularly vulnerable workers, and should be based on law that is efficient, effective and comprehensive, with expeditious outcomes, and that encourages voluntary compliance, and

Recognizing that national policy should be the result of consultation with the social partners and should provide guidance to the parties concerned in the workplace, and

Recognizing that national policy should promote economic growth, job creation and decent work, and

Considering that the globalized economy has increased the mobility of workers who are in need of protection, at least against circumvention of national protection by choice of law, and

Noting that, in the framework of transnational provision of services, it is important to establish who is considered a worker in an employment relationship, what rights the worker has, and who the employer is, and

Considering that the difficulties in establishing the existence of an employment relationship may create serious problems for those workers concerned, their communities, and society at large, and

Considering that the uncertainty as to the existence of an employment relationship needs to be addressed to guarantee fair competition and effective protection of workers in an employment relationship in a manner appropriate to national law or practice, and

Noting all relevant international labour standards, especially those addressing the particular situation of women, as well as those addressing the scope of the employment relationship, and

Having decided upon the adoption of certain proposals with regard to the employment relationship, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation;

adopts this fifteenth day of June of the year two thousand and six the following Recommendation, which may be cited as the Employment Relationship Recommendation, 2006.

I. NATIONAL POLICY OF PROTECTION FOR WORKERS IN AN EMPLOYMENT RELATIONSHIP

1. Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.

2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate to ensure effective protection for workers in an employment relationship.

3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.

4. National policy should at least include measures to:

(a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;

(b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

(c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due;

(d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;

(e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;

(f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and

(g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

5. Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

6. Members should:

(a) take special account in national policy to address the gender dimension in that women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity of an employment relationship; and

(b) have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.

7. In the context of the transnational movement of workers:

(a) in framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship;

(b) where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.

8. National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.

II. DETERMINATION OF THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.

11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:

(a) allowing a broad range of means for determining the existence of an employment relationship;

(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and

(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or

involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

14. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.

15. The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities.

16. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.

17. Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.

18. As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.

III. MONITORING AND IMPLEMENTATION

19. Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

20. The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.

21. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.

22. Members should establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the

transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.

IV. FINAL PARAGRAPH

23. This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).

Annex II.

Resolution concerning the employment relationship

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 95th Session, and

Having adopted the Recommendation concerning the employment relationship,

Noting that Paragraphs 19, 20, 21 and 22 recommend that Members should establish and maintain monitoring and implementing mechanisms, and

Noting that the work of the International Labour Office helps all ILO constituents better to understand and address difficulties encountered by workers in certain employment relationships,

Invites the Governing Body of the International Labour Office to instruct the Director-General to:

1. Assist constituents in monitoring and implementing mechanisms for the national policy as set out in the Recommendation concerning the employment relationship;
2. Maintain up-to-date information and undertake comparative studies on changes in the patterns and structure of work in the world in order to:
 - (a) improve the quality of information on and understanding of employment relationships and related issues;
 - (b) help its constituents better to understand and assess these phenomena and adopt appropriate measures for the protection of workers; and
 - (c) promote good practices at the national and international levels concerning the determination and use of employment relationships;
3. Undertake surveys of legal systems of Members to ascertain what criteria are used nationally to determine the existence of an employment relationship and make the results available to Members to guide them, where this need exists, in developing their own national approach to the issue.

Annex III.

Glossary of terms

English	French	Spanish
<i>Autonomous worker</i> : a new Canadian term coined by the 2006 Arthurs Report on fair labour standards to describe a status between <i>employee</i> and <i>independent contractor</i> , applicable to workers who are more like the former than the latter.		
<i>Case law, jurisprudence</i>	Jurisprudence	Jurisprudencia
<i>Common law</i>	idem	idem
<i>Casualisation of employment</i>	Précarisation de l'emploi	Precarización del empleo
<i>Casual/occasional/contingent worker or employee</i>	Travailleur occasionnel/temporaire	Trabajador ocasional/trabajador precario
<i>Contractor</i> (also, in construction: <i>builder-contractor</i>), <i>sub-contractor</i>	Sous-traitant, preneur d'ordres	Contratista, subcontratista
<i>Contract of employment</i> (employment contract)/ <i>contract of service</i>	Contrat de travail	Contrato de trabajo
<i>Contract for service</i>	Contrat d'entreprise	Contrato (de arrendamiento) de servicios o de obra
<i>Contract labour/work provided by an enterprise/work by a self-employed person</i> (depending on the context)	Travail fourni par une entreprise/par un travailleur indépendant; <u>selon le contexte</u>	Trabajo de empresa/de trabajador independiente, <u>según el contexto</u> Trabajo por contrata/Trabajo en régimen contractual
<i>Contract worker/worker of a contractor/self-employed</i> (depending on the context)	Travailleur d'une entreprise sous-traitante/travailleur indépendant qui fournit un service en vertu d'un contrat; <u>selon le contexte</u>	Trabajador de un contratista/trabajador autónomo que presta un servicio en virtud de un contrato/ trabajador contratado; <u>según el contexto</u>
<i>Contracting out/outsourcing/ sub-contracting</i>	Sous-traitance (d'activités) (contrat commercial), externalisation	Subcontratación de obras o servicios/ externalización/ tercerización

English	French	Spanish
<p><i>Dependent contractor</i>: this term is used in Canadian labour legislation to denote workers who are not, strictly speaking, employees, but are not <i>independent contractors</i> because they are more like employees in what they do and the conditions in which they do it, their primary characteristic being economic dependence upon the employer.</p>		
<i>Dependent worker</i>	Le travailleur dépendant	Trabajador dependiente
<i>Disguised employment</i> (different from <i>undeclared work</i>)	Travail déguisé (sous la forme d'un contrat civil ou commercial (à différencier de non déclaré))	Trabajo encubierto, disfrazado (distinto del trabajo no declarado)
<i>Duress</i>	Contrainte, rigueur	Coacción, apremio, rigor
<i>Employee</i> , (distinct from <i>worker</i> , below) is an individual who has entered into a contract for employment.	Salarié	Asalariado/trabajador por cuenta ajena/empleado
<p><i>Employer</i></p> <ul style="list-style-type: none"> - <i>associated employer</i> (in Latin America) - <i>common employer/related employers</i>: in Canada, refers to two or more related organizations which operate under common control or direction (e.g., separate corporate subsidiaries within a conglomerate) as a single employer for the purposes of collective bargaining and labour standards protection. Typically this finding is made in order to counteract steps taken by employers to circumvent employment rights through manipulation of the corporate structure. 	Employeur, patron	Empleador, patrón, patrono – empleador complejo
<i>Employment relationship</i>	Relation de travail (ou d'emploi CDN)	Relación de trabajo

English	French	Spanish
<i>Fake contract</i>	Simulation de contrat	Contrato simulado
<i>Fixed-term contract</i>	Contrat de durée déterminée (CDD)	Contrato de duración determinada/ por tiempo determinado
<i>Contract without limit of time/ open-ended contract/ indefinite contract</i>	Contrat de durée indéterminée (CDI)	Contrato de duración indefinida/ por tiempo indeterminado
<i>Fixed-price contract</i>	Contrat au forfait/ sur commande (opposé du contrat en régie)	Trabajo por obra, contrato por obra
<i>In business on one's own account</i>	Travail à compte propre	Trabajo autónomo, trabajo por cuenta propia, trabajo independiente
<i>Intermediary</i>	Intermédiaire	Intermedio
<i>Involuntary part-time work</i>	Temps partiel contraint (par opposition à choisi)	Tiempo parcial impuesto
<i>Mutuality of obligation/mutual obligation</i> (currently the predominant UK test) in determining employment status: is there an obligation on the employer to provide work, and is there a concomitant obligation on the individual to accept the work offered?	Obligation réciproque	
<i>Objectively ambiguous employment relationships</i>	Relation de travail objectivement ambiguë	Relación de trabajo objetivamente ambigua
<i>On-call work</i> refers to periods of time when a worker is required to be available at the workplace or elsewhere and can be called on to work as and when required, but is not performing the tasks required by the contract of employment.		
<i>Primacy of facts principle</i>	Principe de réalité des faits, primauté des faits	Principio de la primacía de la realidad
<i>Private employment agency/ temporary work agency</i> (see Convention No. 181) refers to any natural or legal person, independent of the public authorities, which provides labour market services for matching offers of and	Agence d'emploi privée, y compris entreprise de travail temporaire/ intérimaire/bureau de placement	Agencia de empleo incluye a las empresas de trabajo temporal o de "servicios eventuales"/agencia de colocación

English	French	Spanish
applications for employment, without the private employment agency becoming a party to the employment relationships which may arise.		
<i>Salary/remuneration</i> (see Convention No. 100)	Traitement, <i>parfois</i> salaire	Sueldo, salario
<i>Scope of the employment relationship.</i>	Champ de la relation de travail	Ámbito de la relación de trabajo
<i>Self-employed/independent worker/ independent contractor/freelance/ own-account</i>	Travailleur indépendant/ à son compte	Trabajador independiente, autónomo, por cuenta propia
<i>Stakeholder</i>	Partie prenante/intéressée, partenaire	Parte interesada, asociado, interlocutor
<i>Subordinate worker</i>		Trabajador para subordinado (Latin America)
<i>Temporary employment agency/manpower company</i> (see Convention No. 181)		Empresa de trabajo temporal (ETT in Latin America)
<i>Legal concept of subordination</i>	Lien juridique de subordination	Vínculo jurídico de subordinación
<i>Tâcheron system</i> : in some French-speaking African countries, a system whereby an independent subcontractor contracts with an enterprise or a project manager to perform work or services for an agreed price.	Tâcheron system ou Maître ouvrier	
<i>Tax avoidance</i>	Eluder la fiscalité	Eludir impuestos
<i>Tax evasion</i>	Evasion fiscale	Evasión fiscal
<i>Temporary worker/employee</i> is used in two senses:		
(i) a non-permanent worker, being a person on a fixed term or task-related contract that both parties know will end (see Convention No. 158, Art.2(1)(a) “workers engaged under a contract of employment for a		

English	French	Spanish
<p>specified period of time or a specified task”);</p> <p>(ii) as distinct from a worker supplied by a temporary employment agency.</p> <p>In both cases they do not have the status of a permanent worker and typically do not enjoy the employment benefits of the latter.</p>		
<i>Time sharing/job sharing</i>	Travail à temps partagé	Tiempo compartido/subdividido
<i>Transfer of an undertaking</i>	Transfert d’une entreprise (ou d’une partie d’entreprise)	Transferencia de una empresa o parte de ella
<i>Triangular employment relationship</i>	Relation de travail triangulaire	Relación de trabajo triangular
<i>User/client/the principal, the main company</i>	Utilisateur/client/donneur d’ordres/maître d’ouvrage	El usuario/el utilizador/el dueño de la obra o faena
<i>Wage</i> (see Convention No. 100)	Salaire, gain (salarial)	Salario
<i>Work for more than one employer</i>	Multi-salariat	Multiempleo/Trabajo para varios empleadores
<i>Worker</i> (should not be confused with <i>employee</i> , above): a generic term covering persons who work; the concept of <i>worker</i> includes <i>employees</i> but it also includes certain independent contractors who contract personally to supply their work to an employer.	Travailleur	Trabajador
<i>Worker dispatching</i> (used in Japan and Korea)	Convention No. 181, Art1(1)(b)	
<i>Vulnerable worker</i> : in the Canadian context, refers to workers who lack either collective or individual bargaining power. They are therefore less likely than most to secure or retain a decent job, and are more likely than most to work under inappropriate or exploitative		

English	French	Spanish
conditions. Typically, they are paid low salaries and receive few fringe benefits, work unsociable hours or in difficult conditions, have limited or no access to training, have poor prospects of career advancement and relatively short job tenure. They often lack the knowledge, capacity or financial means to realize whatever statutory or contractual rights they are supposedly entitled to.		
<i>Zero-hour contract</i> is understood like <i>on-call work</i> (above), under which the worker is not guaranteed a fixed number of hours; rather, he or she is expected to be on call and receive compensation only for hours worked.	Contrat sans heures ni horaires fixes	Contrato sin horas de trabajo prefijadas

Annex IV.

Relevant international labour standards for consideration when elaborating national policies

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), clearly apply to all workers.

Minimum Age Convention, 1973 (No. 138)

Article 1

Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.

Article 2

1. Each Member which ratifies this Convention shall specify, in a declaration appended to its ratification, a minimum age for admission to employment or work within its territory and on means of transport registered in its territory; subject to Articles 4 to 8 of this Convention, no one under that age shall be admitted to employment or work in any occupation.

Article 5

3. The provisions of the Convention shall be applicable as a minimum to the following: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.

Rural Workers' Organisations Convention, 1975 (No. 141)

Article 2

1. For the purposes of this Convention, the term rural workers means any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or, subject to the provisions of paragraph 2 of this Article, as a self-employed person such as a tenant, sharecropper or small owner-occupier.

2. This Convention applies only to those tenants, sharecroppers or small owner-occupiers who derive their main income from agriculture, who work the land themselves, with the help only of their family or with the help of occasional outside labour and who do not (a) permanently employ workers; or (b) employ a substantial number of seasonal workers; or (c) have any land cultivated by sharecroppers or tenants.

Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

Article 2

1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to operate procedures which ensure effective consultations, with respect to the matters concerning the activities of the International Labour Organisation set out in Article 5, paragraph 1, below, between representatives of the government, of employers and of workers.

Article 5

1. The purpose of the procedures provided for in this Convention shall be consultations on (a) government replies to questionnaires concerning items on the agenda of the International Labour Conference and government comments on proposed texts to be discussed by the Conference; (b) the proposals to be made to the competent authority or authorities in connection with the submission of Conventions and Recommendations pursuant to article 19 of the Constitution of the International Labour Organisation; (c) the re-examination at appropriate intervals of unratified Conventions and of Recommendations to which effect has not yet been given, to consider what measures might be taken to promote their implementation and ratification as appropriate; (d) questions arising out of reports to be made to the International Labour Office under Article 22 of the Constitution of the International Labour Organisation; (e) proposals for the denunciation of ratified Conventions.

and accompanying ***Recommendation No. 152***

Para 6. The competent authority, after consultation with the representative organisations, should determine the extent to which these procedures should be used for the purpose of consultations on other matters of mutual concern, such as – ... (b) the action to be taken in respect of resolutions and other conclusions adopted by the International Labour Conference, regional conferences, industrial committees and other meetings convened by the International Labour Organisation ...

Labour Administration Convention, 1978 (No. 150)

Article 6(2)

The competent bodies within the system of labour administration, taking into account international labour standards, shall – ...

(c) make their services available to employers and workers, and their respective organisations, as may be appropriate under national laws or regulations, or national practice, with a view to the promotion—at national, regional and local levels as well as at

the level of the different sectors of economic activity --of effective consultation and co-operation between public authorities and bodies and employers' and workers' organisations, as well as between such organizations ...

Article 7

When national conditions so require, with a view to meeting the needs of the largest possible number of workers, and in so far as such activities are not already covered, each Member which ratifies this Convention shall promote the extension, by gradual stages if necessary, of the functions of the system of labour administration to include activities, to be carried out in co-operation with other competent bodies, relating to the conditions of work and working life of appropriate categories of workers who are not, in law, employed persons, such as (a) tenants who do not engage outside help, sharecroppers and similar categories of agricultural workers; (b) self-employed workers who do not engage outside help, occupied in the informal sector as understood in national practice; (c) members of co-operatives and worker-managed undertakings; (d) persons working under systems established by communal customs or traditions.

Labour Relations (Public Service) Convention, 1978 (No. 151)

Article 1

1. This Convention applies to all persons employed by public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to them.
2. The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.
3. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

Collective Bargaining Convention, 1981 (No. 154)

Article 2

For the purpose of this Convention the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.

Termination of Employment Convention, 1982 (No. 158)

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.
2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period.

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

and accompanying ***Recommendation No. 166***

Paragraph 2

(1) This Recommendation applies to all branches of economic activity and to all employed persons.

(2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period.

Paragraph 3

(1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following: (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration; (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration; (c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

Private Employment Agencies Convention, 1997 (No. 181)

Article 1

1. For the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services: (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom; (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a “user enterprise”) which assigns their tasks and supervises the execution of these tasks ...

Article 11

A Member shall, in accordance with national law and practice, take the necessary measures to ensure adequate protection for the workers employed by private employment agencies as described in Article 1, paragraph 1(b) above, in relation to: (a) freedom of association; (b) collective bargaining; (c) minimum wages; (d) working time and other working conditions; (e) statutory social security benefits; (f) access to training; (g) occupational safety and health; (h) compensation in case of occupational accidents or diseases; (i) compensation in case of insolvency and protection of workers claims; (j) maternity protection and benefits, and parental protection and benefits.

Article 12

A Member shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the services referred to in paragraph 1(b) of Article 1 and of user enterprises in relation to: (a) collective bargaining; (b) minimum wages; (c) working time and other working conditions; (d) statutory social security benefits; (e) access to training; (f) protection in the field of occupational safety and health; (g) compensation in case of occupational accidents or diseases; (h) compensation in case of insolvency and protection of workers claims; (i) maternity protection and benefits, and parental protection and benefits.

and accompanying ***Recommendation No. 188***

Paragraph 5

Workers employed by private employment agencies as defined in Article 1(1)(b) of the Convention should, where appropriate, have a written contract of employment specifying their terms and conditions of employment. As a minimum requirement, these workers should be informed of their conditions of employment before the effective beginning of their assignment.

Paragraph 6

Private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike.

Paragraph 8

Private employment agencies should:

- (a) not knowingly recruit, place or employ workers for jobs involving unacceptable hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind;
- (b) inform migrant workers, as far as possible in their own language or in a language with which they are familiar, of the nature of the position offered and the applicable terms and conditions of employment.

Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159)

Article 1

1. For the purposes of this Convention, the term disabled person means an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.
2. For the purposes of this Convention, each Member shall consider the purpose of vocational rehabilitation as being to enable a disabled person to secure, retain and advance in suitable employment and thereby to further such person's integration or reintegration into society.

Article 2

Each Member shall, in accordance with national conditions, practice and possibilities, formulate, implement and periodically review a national policy on vocational rehabilitation and employment of disabled persons.

Article 3

The said policy shall aim at ensuring that appropriate vocational rehabilitation measures are made available to all categories of disabled persons, and at promoting employment opportunities for disabled persons in the open labour market.

Indigenous and Tribal Peoples Convention, 1989 (No. 169)

Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.
2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
 - (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
 - (b) equal remuneration for work of equal value;
 - (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
 - (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.
3. The measures taken shall include measures to ensure:
 - (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them; ...
4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

Part-Time Work Convention, 1994 (No. 175)

Article 9

1. Measures shall be taken to facilitate access to productive and freely chosen part-time work which meets the needs of both employers and workers, provided that the protection referred to in Articles 4 to 7 is ensured.
2. These measures shall include: (a) the review of laws and regulations that may prevent or discourage recourse to or acceptance of part-time work; (b) the use of employment services, where they exist, to identify and publicize possibilities for part-time work in their information and placement activities; (c) special attention, in employment policies, to the needs and preferences of specific groups such as the unemployed, workers with family responsibilities, older workers, workers with disabilities and workers undergoing education or training.
3. These measures may also include research and dissemination of information on the degree to which part-time work responds to the economic and social aims of employers and workers.

Maternity Protection Convention, 2000 (No. 183)

Article 2

1. This Convention applies to all employed women, including those in atypical forms of dependent work.

Forced Labour Convention, 1930 (No. 29)

Article 1

1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.

Article 4

1. The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.

2. Where such forced or compulsory labour for the benefit of private individuals, companies or associations exists at the date on which a Member's ratification of this Convention is registered by the Director-General of the International Labour Office, the Member shall completely suppress such forced or compulsory labour from the date on which this Convention comes into force for that Member.

Migration for Employment Convention (Revised), 1949 (No. 97)

Article 2

Each Member for which this Convention is in force undertakes to maintain, or satisfy itself that there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information.

Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

Article 10

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Article 12

Each Member shall, by methods appropriate to national conditions and practice-

(g) guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.

Labour Clauses (Public Contracts) Convention, 1949 (No. 94)

Article 3

This Convention applies to work carried out by subcontractors or assignees of contracts; appropriate measures shall be taken by the competent authority to ensure such application. This means that certain national laws provide for the inclusion of a declaratory clause in public contracts in relation to contracts of employment, to the effect

that every contract of employment entered into pursuant to the contract shall be subject to the Employment Act.

Safety and Health in Agriculture Recommendation, 2001 (No. 192)

Self-employed farmers

13. (1) In accordance with national law and practice, measures should be taken by the competent authority to ensure that self-employed farmers enjoy safety and health protection afforded by the Convention.

(2) These measures should include: (a) provisions for the progressive extension of appropriate occupational health services for self-employed farmers; (b) progressive development of procedures for including self-employed farmers in the recording and notification of occupational accidents and diseases; and (c) development of guidelines, educational programmes and materials and appropriate advice and training for self-employed farmers covering, inter alia: (i) their safety and health and the safety and health of those working with them concerning work-related hazards, including the risk of musculoskeletal disorders, the selection and use of chemicals and of biological agents, the design of safe work systems and the selection, use and maintenance of personal protective equipment, machinery, tools and appliances; and (ii) the prevention of children from engaging in hazardous activities.

14. Where economic, social and administrative conditions do not permit the inclusion of self-employed farmers and their families in a national or voluntary insurance scheme, measures should be taken by Members for their progressive coverage to the level provided for in Article 21 of the Convention. This could be achieved by means of: (a) developing special insurance schemes or funds; or (b) adapting existing social security schemes.

15. In giving effect to the above measures concerning self-employed farmers, account should be taken of the special situation of: (a) small tenants and sharecroppers; (b) small owner-operators; (c) persons participating in agricultural collective enterprises, such as members of farmers' cooperatives; (d) members of the family as defined in accordance with national law and practice; (e) subsistence farmers; and (f) other self-employed workers in agriculture, according to national law and practice.

Promotion of Cooperatives Recommendation, 2002 (No. 193)

Paragraph 8

National policies should notably: ...(b) ensure that cooperatives are not set up for, or used for, non-compliance with labour law or used to establish disguised employment relationships, and combat pseudo cooperatives violating workers' rights, by ensuring that labour legislation is applied in all enterprises.

Annex V.

Checklist of criteria when establishing a national policy

- ☐ Have there been **consultations** with the social partners about labour market developments demonstrating issues (like lack of protection of certain workers) that involve the employment relationship?
- ☐ Have those consultations led to a **national policy**?
- ☐ Does the national policy contain **clear guidance** to workers and employers and their organizations about how to determine the existence – or not – of an employment relationship?
- ☐ Is the national policy **gender-sensitive**?
- ☐ Does the policy refer to any **vulnerable groups** in the country who may require special help in proving the existence of an employment relationship?
- ☐ Is the national policy **holistic**?
- ☐ Does the policy contain a **presumption** that such a relationship exists?
- ☐ Does the national policy allow the **burden of proving** that an employment relationship exists to shift, from the worker claiming such a relationship, to the other party?
- ☐ Does the national policy list **criteria** as references points for determining whether an employment relationship exists?
- ☐ What national institutions exist **to monitor labour market developments**, and are their reports and data being used to ascertain whether measures are needed in the field of the employment relationship?
- ☐ What international cooperation can be leveraged to track developments concerning the employment relationship in the transnational movement of workers?